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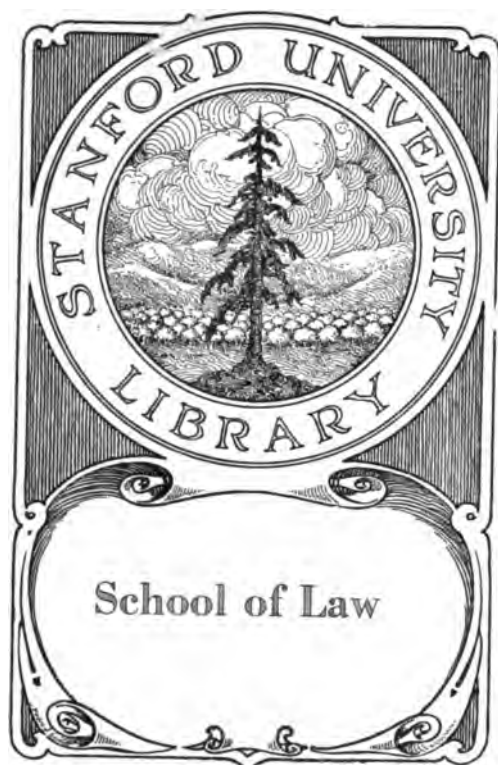
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TABLE OF CASES

Reported and Noted in this Volume.

	PAGE		PAGE
Adams v. Stout.....	141	Barretto v. Young.....	667
Adelaide, Township of, and Warwick v. Township of Metcalfe.....	124	Barron v. Willis.....	54, 622
African Gold Co., re.....	19	Barsht v. Tagg.....	225
Agnese, In the goods of.....	296	Bavins v. London and S.W. Bank....	206
Ainsworth v. Wilding.....	666	Beam v. Beatty.....	423
Alaska Steamship Co. v. Macaulay...	686	Beckhuson v. Hamblet.....	441
Alexander v. Automatic Telephone Co.	590	Bell v. Mitchell.....	247
Allain, Ex parte.....	141	Bell v. Wilson.....	314
Allcroft v. Morrison.....	98	Bennicourt v. Le Gendre.....	374
Allen v. Gold Reefs.....	482	Bew v. Bew.....	18
Allen, Re, and Nasmith.....	102, 639	Bingham v. McMurray.....	121
Allison v. Breen.....	165, 312	Birks, In re, Kenyon v. Birks.....	367
Allstadt v. Gortner.....	158	Black v. Moore.....	724
Anderson v. Beard.....	585	Blackburn & Co., In re.....	91
Anglo-Canadian Music Publishing Association v. Somerville.....	168	Blanchard v. Muir.....	287
Appleby v. Turner.....	313, 344	Boak v. Higgins.....	353
Apted, In the goods of.....	16	Boardman v. North Waterloo Ins. Co.	234
Armstrong v. Johnston.....	458	Bogart v. Township of King.....	596
Armstrong v. Lye (No. 2).....	309	Bogardus v. Wellington.....	637
Asbestos & Asbestic Co. v. Durand...	303	Bollander v. City of Ottawa.....	420
Ashby v. Wilson.....	150	Book v. Book.....	596
Association Pharmaceutique v. Liver- nois.....	451	Boosey v. Wright.....	207
Attorney-General v. Brighton & Hove Co-operative Association.....	298	Booth, In re, Pickhard v. Booth.....	485
Attorney-General v. Dunlop.....	607	Born v. Turner.....	626
Attorney-General for British Columbia and the New Vancouver Coal Mining Co. v. Esquimalt and Nanaimo Rail- way Company.....	388	Rothwell v. Burnside.....	312
Attorney-General v. London and North Western Ry. Co.....	116	Bowes, In re, Strathmore v. Vane....	628
Attorney-General v. Newman.....	99	Bowman v. Bowman.....	56
Babcock v. Standish.....	457	Boys' Home v. Lewis.....	417
Bagshaw v. Pimm.....	445	Brenchley v. McLeod.....	32
Bailey v. Isle of Thanet Ry. Co.....	409	Brewer v. Conger.....	124
Baker v. Kilpatrick.....	318	Brewster v. Hendershot.....	307
Balcom v. Croft.....	606	Brigham v. Banque Jacques-Cartier..	500
Balwyn v. Smith.....	412	Brigham v. The Queen.....	636
Bangor, In re, and North Wales M. M. P. Association.....	54	Brine v. Steamship "Tiber".....	635
Bank of British Columbia v. Oppen- heimer.....	246	British Motor Syndicate v. Taylor....	412
Bank of New Zealand v. Simpson....	375	Brockbank v. Holmes.....	239
Bank, In re, of Syria.....	629	Brothers John v. Holmes.....	220
Bank of Toronto v. Quebec Fire Ins. Co.....	336	Brown v. Toronto General Trusts Co.	712
Banque Jacques-Cartier v. Gratton..	378	Bryant v. Hancock.....	55
Barber v. McQuaig.....	159	Bugbee v. Clergue.....	126
		Burchell v. Wilde.....	411
		Burger v. Indemnity M.M. Assurance Co.....	662
		Burke v. B.C. Electric Railway Co....	174
		Burnett, In re, and Town of Durham.	66
		Burnham, In re, and the Township of Hamilton.....	350
		Caldwell v. Town of Galt.....	305
		Cameron v. Ottawa Electric R.W. Co.	387
		Campbell v. Gillespie.....	224
		Canadian Mutual L. & S. Co. v. Nisbet	162

	PAGE		PAGE
Canadian, In re, Pacific R.W. Co. and City of Toronto.....	126, 380	Didisheim v. London & Westminster Bank.....	588
Canadian Pacific Railway Co. v. Parke	57	Dillon v. Sinclair.....	648
Canadian Pacific R.W. Co. v. Winnipeg.....	674	Dingwall v. McBean.....	501
Cannon v. Abingdon.....	443	Dixon, In re, Heynes v. Dixon.....	51
Carr v. Lynch.....	414	Dixon v. Kennaway.....	489
Carscallen v. Wallbridge.....	573	Dodge, In re, & Dennison Co.....	685
Carter, In re, Dodds v. Pearson.....	487	Doidge v. Mimms.....	171
Caston v. City of Toronto.....	448	Dominion Construction Co. v. Good..	123
Challoner v. Township of Lobo.....	707	Driefontaine Gold Mines v. Janson....	661
Chant, In re, Chant v. Lemon.....	668	Dueber Watch Case Co. v. Taggart.....	449, 570
Choate v. Ontario Rolling Mills Company.....	306	Dunsmuir v. Lowenburg.....	379
Clark v. Bellamy.....	452	Dupas, In re.....	34
Clemow, In re, Yeo v. Clemow.....	625	Dupuis, Ex parte.....	317
Clifden, In re, Annaly v. Agar-Ellis..	485	Durant v. Roberts.....	328
Clifton v. Crawford.....	418		
Cloutier v. Georgeson.....	244	Earle v. Kingscote.....	221
Colchester North, In re Township of, and Township of Gosfield North,	310, 457	Eby v. McTavish.....	572
Cole v. Canadian Pacific Railway Co.	163	Ecclesiastical Commissioners v. Pinney	91
Collidge v. Nelson.....	339	Eckardt v. Lancashire Insurance Co..	421
Confederation, In re, Life Association and Cordingly.....	98	Eddy v. Eddy.....	495
Confederation Life Ass'n v. Labatt....	419	Edgar v. Plomley.....	672
Conley v. Canadian Pacific Railway..	709	Edsall v. Wray.....	601
Consolidated Exploration Co. v. Musgrave.....	148	Ellis v. Rowbotham.....	410
Coolgardie, In re, Goldfields.....	370	English v. Lamb.....	571
Cooper-King v. Cooper-King.....	299	Evans v. Chandler.....	341
Cornford v. Carlton Bank.....	114	Eversley, In re, Mildmay v. Mildmay..	152
Cornwall, In re Town of, and Cornwall Waterwork Co.....	124	Eves v. Booth.....	451
Cornwall v. Henson.....	89, 665	Ewing v. Hewitt.....	23, 306
Costa Rica Ry. Co. v. Forwood.....	484	Falck v. Williams.....	375
Cowan, In re.....	726	Falkingham v. Victorian Railway Commissioners.....	672
Cowan v. Fisher.....	67	Farlow v. Stevenson.....	207
Coyle v. Coyle.....	129	Farquharson, Re Estate of John.....	723
Craig v. Cromwell.....	344	Farr v. Howell.....	384
Craig v. Matheson.....	138	Farrelly v. Corrigan.....	58
Cranston v. English Canadian Co.....	427	Fawkes v. Swayzie.....	66
Cross, In re.....	711	Fayne v. Langley.....	24
Cruddas, In re, Cruddas v. Smith....	483	Feigenbaum v. Jackson.....	357
Crumpe v. Crumpe.....	372	Fenner v. Blake.....	284
Crutchfield v. Harbottle.....	358	Ferguson v. Galt Public School Board	638
Culbertson v. McCullough.....	454	Fickus, In re, Farina v. Fickus.....	300
Cully v. Ferdais.....	379	File v. Unger.....	454
Cummings v. Pickles.....	352	Floor v. Michigan Central Railway Company.....	308
Curry, Re.....	572	Foakes v. Jackson.....	488
Cushing v. McLeod.....	241	Forbes v. Pearson.....	606
		Ford, In re.....	206, 570
D. v. A. & Co.....	370	Forman & Co. v. The Liddesdale....	376
Dalgleish v. Lowther.....	83	Foster v. Globe Venture.....	488
Dart v. St. Keverne Mining Co.....	70	Foster, Re, and the City of Hamilton	64
Davies v. The Queen.....	232	Foster v. Ivey.....	640
Davis v. Fenkins.....	204	Fox v. The Star.....	227
Davis v. Harris.....	410	Frankenburg v. Great Horseless Carriage Co.....	326
Deakin, In re.....	702	Fraser v. Drew.....	214
DeNicols v. Curlier.....	283	Fraser v. Orberndorfer.....	101
Dibblee v. Fry.....	242	Frechette v. Simoneau.....	675
Dickerson v. Radcliffe.....	598		
		Gardner v. Canada Mnf. & Publishing Co.....	238

Table of Cases.

vii

	PAGE
Gardner v. Hodgson's Kingston Breweries Co.	413
Gearing v. Robinson.	421, 461
Geddes, In re, and Garde, and In re Geddes and Cochrane.	708
Gedge v. Royal Exchange Ass. Corp.	584
General Engineering Co. v. Dominion Cotton Mills Co. (1).	96
General Engineering Co. v. Dominion Cotton Mills Co. (2).	97, 381
General, In re, Railway Syndicate.	331
Gentle v. Faulkner.	585
Gibbons, Re.	23
Gibbons v. The Queen, St. John Terminal Ry Co., third party.	676
Gibson v. McArthur.	70
Gibson v. Nelson.	641
Gillingham v. Beddow.	627
Girardot v. Welton.	311, 385
Glen, In re, Fleming v. Curry.	304
Glover v. Southern Loan Co.	129
Glubb, In re, Bamfield v. Rogers.	329
Gluckspirie v. Barnes.	492
Goldie & McCulloch Co. v. Harper.	64
Gordon v. Street.	85
Gordon v. City of Victoria.	686
Goy, In re, Farmer v. Goy.	623
Grand Trunk Railway v. Therrien.	673
Grand Trunk R. W. Co. v. City of Toronto.	597
Grant v. The Gold Exploration Syndicate.	205
Graves v. Gorrie.	710
Great Western Ry. Co., The, v. The London & County Banking Co.	701
Green, Ex parte.	316
Green v. New York & Ottawa R. W. Co.	123
Greenway v. Gardiner.	130
Greenwood, In re.	587
Greenwood v. Leather Shod Wheel Co.	368
Grove v. Bender.	161
Growell v. Smith.	139
Griffith v. Harwood.	378
Grutchfield v. Harbottle.	575
Guthrie v. Canadian Pacific R. W. Co.	125
Halifax, City of v. Farquhar.	719
Halifax Electric Tramway Co. v. Inglis.	303
Hall v. The Queen and the Kaslo & Slocan Railway Company.	174
Hall v. Bowerman.	678
Hamilton et al. v. Grant et al.	716
Hamilton v. Grant.	675
Hamilton v. Northey Mfg. Co.	235
Hand v. Warren.	37
Handley v. Archibald.	211
Harper v. Toronto Type Foundry Co.	99
Harrington v. Peters.	352
Harris v. Bank of British North America.	29, 68
Harrison, In re.	100

	PAGE
Hart v. McMullen.	302
Haven v. Hughes.	127
Hay v. Northcote.	628
Hayes, In re, Turnbull v. Hayes.	667
Henderson v. Merthyr Tydfil.	285
Hepworth v. Pickles.	152
Herman v. Wilson.	595
Hesse v. St. John Railway Co.	212
Hexter v. Pearce.	326
Hibben v. Collister.	448
Hickinson v. Maisey.	410
Hicks v. Ogden.	139
Higgins v. Trusts Corp. of Ontario.	453
Hill v. Ingersoll & Port Burwell Gravel Road Co.	639
Hilliker v. Knights of the Maccabees.	23
Hogarth v. Walker.	586
Hollis Hospital, Re, Hagues Contract.	50
Holmes v. Great Northern Ry.	663
Holmes v. Town of Goderich.	422
Honan v. Bar of Montreal.	22
Honour v. Equitable Life Assurance Society.	491
Hope v. Walter.	297
Hopkins, In re, Estate.	678
Hood v. Coleman Planing Mill and Lumber Company.	308
Horsman v. City of Toronto.	29, 451
Hubbell, In re.	601
Huggard, In re.	172
Hyderabad Co. v. Willoughby.	15
Hynes, In re, Hodgins v. Andrews.	598
Ianson v. Clyde.	215
Ince v. City of Toronto.	419
Independent Order of Forresters v. Pegg.	98, 604
Ingle v. Vaughan Jenkins.	669
Iron Mask v. Centre Star.	102
Irvine v. Sparks.	160
Irvine v. Turnbull.	443
Jackson, In re, v. Clark.	68
Jackson v. Gardiner.	286
Jacob v. Down.	624
James v. Grand Trunk Railway Co.	384
Johnson v. Kirk.	415
Johnson v. Miller.	37
Jolly, In re, Gathercole v. Norfolk.	299
Jones, Ex parte.	140
Jones v. Barnett.	331
Jones v. Biernstein.	117
Jones v. City of St. John.	212
Jones v. Linde British Refrigeration Co.	642
Jones v. Township of Stephenson.	680
Keerson, Ex parte.	574
Kelcey, Re, Tyson v. Kelcey.	21
Kelly v. Davidson.	214, 386
Kennedy v. Portage la Prairie.	34
Kimball v. Cooney.	454

	PAGE		PAGE
Kimber v. Admans.....	367	McLellan, In re, and Township of Chin-	
King v. Boulton.....	647	guacousy.....	418
King v. Rogers.....	340	McLeod v. St. Aubyn.....	58
Kirby v. Bangs.....	125	McManus v. Tracy.....	573
Kirby v. Rathburn Co.....	459	McMillan v. McMillan.....	305
Knowles v. Bolton.....	584	McQuillan v. Town of St. Mary's.....	65
Knox v. Munro.....	243	Macdonald v. Mail Printing Co.....	603
		Macdonald v. Sheppard Publishing Co.....	713
Ladies' Dress Association v. Pulbrook	662	Mackenzie, In re Neil.....	83
Lafrance v. LaFontaine.....	21	Macpherson v. Moody.....	168
Lagunas Nitrate Co. v. Lagunas		Madden v. Connell.....	63
Syndicate.....	16	Madden v. Nelson & Fort Sheppard	
Lake Erie & Detroit River Railway v.		R.W. Co.....	62
Barclay.....	416	Maddock, In re, Butt v. Wright.....	54
Lake of the Woods Milling Co. v.		Main, The, Colliery Co. v. Davies.....	671
Collin.....	425	Manchester Ship Canal v. Manchester	
Landry, Ex parte.....	169	Race Course Co.....	668
Lane v. Rendall.....	86	Mann v. Grand Trunk R.W. Co.....	714
Langley v. VanAllen.....	641	Mar-hall, In re, & Salt.....	626
Larkin v. Larkin.....	571	Martin, In re, Loustalan v. Loustalan	663
Larose v. The Queen.....	637	Mason, Re, Ogden v. Mason.....	625
Law Society of Upper Canada v. S. R.		Maudslay, In re, Maudslay v. Mauds-	
Clarke.....	350	lay.....	413
Lawton Saw Co. v. Machun.....	723	May v. Platt.....	438
Lazier v. Robertson.....	124	Medland and City of Toronto, Re.....	28
Leak v. City of Toronto.....	335	Meek v. Parsons.....	237
Leckie, H. S., Re Estate of.....	136	Meller v. Westbourne.....	574
Lees v. Ottawa & New York R. W. Co.	163	Mercantile, The, Bank v. Evans.....	84
Leonard v. Sweet.....	719	Merchants' Bank v. McKenzie.....	170
Ley, In re.....	246	Messenger v. The Town of Bridgetown	722
Lillie v. Willis.....	24	Metcalfe, Re.....	594
Littledale v. Liverpool College.....	119	Metcalfe, In re Townships of, Adelaide	
Llandudno v. Woods.....	89	and Warwick.....	457
Logan v. Herring.....	340	Metropolitan, In re, Railway Co.....	381
London, In re, Street Railway Assess-		Michaels v. Michaels.....	676
ment.....	128	Milbank v. Milbank.....	364
London, Re, & Northern Bank.....	224	Millar v. Thompson.....	713
Love v. Latimer.....	707	Miller v. Archibald.....	683
Loveday, In the goods of.....	481	Miller v. Borner.....	407
Lucas, Re, Tanner & Co.....	384	Miller v. McCuaig.....	69
Lyles v. Windsor Fair Grounds.....	501	Millon v. Municipality of Kings.....	316
MacDonald v. Grand Trunk R.W. Co.	342	Milward, In re, & Co.....	366
MacGregor v. Sully.....	238	Mitchell v. Town of Pembroke.....	100
McCartee, Re, and Township of Mul-		Mitchell, In re, v. The Pioneer Steam	
mur.....	504	Navigation Company.....	134
McClary v. Howland.....	607	Moffat, In the goods of.....	481
McCleve, Ex parte.....	141	Mohan v. Broughton.....	285
McCormick v. Cockburn.....	236	Moir v. Palmatier.....	170
McCuaig v. Conmee.....	30	Moke v. Township of Osnabruck.....	163
McCulloch v. Township of Caledonia.	158	Molsons Bank v. Cooper.....	39
McDonald v. Gillis.....	720	Montgomery v. Ruppenburg.....	28
McDonald v. Broad Cove Coal Co....	354	Montreal Gas Co. v. Cadieux.....	59
McDonald v. Canadian Pacific Explor-		Montreal Lithographic Co. v. Sabis-	
ation Co.....	38	ton.....	61
McHugh v. Grand Trunk R.W. Co....	711	Montreal Trading Stamp Co. v. City	
McHugh v. The Queen.....	382	of Halifax.....	468
McIntosh v. Port Huron Petrified Brick		Moore v. Ritchie.....	718
Company.....	309	Morson v. Burnside.....	237
McKenzie v. Ross.....	721	Mosher v. Kennan.....	338
McKin v. Township of East Luther....	594	Moxham v. Grant.....	115
McLaren v. Miller.....	680	Murr v. Squire.....	600
McLeod v. The Insurance Companies	351	Murray v. Wurtele.....	712

Table of Cases.

ix

	PAGE
Mutton v. Peat	51, 620
Myers v. Brantford Street R. W. Co.	67, 453
National, In re, Bank of Wales	86
National Society for Distribution of Electricity v. Gibbs	664
National Telephone Co. v. Constables of St. Peter Port	496
Nelson v. Bell	595
Nickoll v. Ashton	586
Nilick, in re, v. Marks	385
Noel v. Chevretils	379
North Eastern Ry. Co., The, v. Hast- ings	493
North of Scotland Mortgage Co. v. Thompson	288
Northey Mfg. Co. v. Sanders	234
Nutt v. Easton	120
O'Brien v. Allen	415
Ontario Bank v. Routhier	504
Ontario Lantern Company v. Hamilton Brass Company	418
Ontario Mining Co. v. Seybold	25
Oppenheimer v. Sperling	173
Ordway v. Le Blanc	685
Orford, In re Township of, and Town- ship of Howard (No. 2)	310
Ottawa, Re, Porcelain & Carbon Co.	383
Ottawa, City of, v. Hunter	674
Overman Wheel Co. v. Forbes Mfg. Co.	241
Overweg, Re, Haas v. Durant	222
Palmer v. Moore	495
Palmer v. Snow	410
Pannell v. City of London Brewery	371
Parent v. Bourbonniere	505
Parker v. Etter	683
Parnell v. Dean	160
Parrslow v. Cochrane	248
Parry, In re, and Hopkin	209
Parry v. Liverpool Malt Co.	284
Parsons v. Hart	500
Parsons v. New Zealand Shipping Co.	408
Pavier v. Snow	173
Pawley, In re, & London and Provincial Bank	149
Payne v. The Cork Co.	299
Peacock v. Cooper	307
Pedlow v. Town of Renfrew	159, 677
Phair v. Phair	101
Pickard v. Tims	167
Pigott v. Employers' Liability Assur- ance Corporation	341
Plester v. Grand Trunk R. W. Co.	461
Potts v. Potts	236
Pouey v. Hordern	371
Powell v. Powell	226
Price, in re, Tomlin v. Latter	369
Pritchard v. Pattison	423, 709

	PAGE
Queen ex rel. American Stoker Co. v. General Engineering Co.	97
Queen v. Brine	644
Queen v. Bullivant	444
Queen, The, v. Fowcett	424
Queen v. Glamorgan	16
Queen v. Gray	441
Queen v. Great West Laundry Co.	317
Queen, The, v. Harwood	636
Queen's Hotel, In re	486
Queen v. Langley	26
Queen v. Leicester	84
Queen, The, v. MacCaffery	714
Queen v. Seton	576
Queen, The, v. Whiffin	428
Queen v. Winslow	33
Quinlan v. Child	700
Rae v. Rae	134
Ramage v. Womack	118
Randall v. Home Life Association	122
Raybould, Re, Raybould v. Turner	221
Receiver General of N.B. v. Turnbull	142
Reddock, In re, and City of Toronto.	594
Reekie v. McNeil	233
Reg. ex rel. Attorney-General for the Dominion v. Fitzgibbon and Thoutet	382
Reg. ex rel. Burnham v. Hagerman & Beamish	337
Reg. v. St. John	30
Regina v. Davey	455
Regina ex rel. Horan v. Evans	235
Regina v. Ireland	27
Regina v. Kempel	312
Regina v. McGarry	237
Regina v. Murdock	453
Regina v. Nicol	428
Regina v. Petrie	357
Regina v. Randolph	678
Regina v. Roche	386
Regina v. Smith	27
Regina v. St. Clair	304
Regina v. The T. Eaton Co.	24
Regina v. Toronto Public School Board	238
Regina v. Union Colliery Company	470
Renton v. Neville	569
Rice v. Noakes	223
Rice v. Reed	115
Rice v. Rice	128
Richmond, Town of v. Lafontaine	122
Ricketts v. Village of Markdale	216
Robock v. Peters	354
Robertson v. Beers	142
Rockwood Agricultural Society, Re	35
Rogers v. Clark	646
Rogers v. Reed	173, 388
Rombough v. Balch	123, 166
Rosenbaum v. Belson	628
Rosenfeldt, In re, Election	426
Ross, Re, Ashton v. Ross	209
Ross v. The Queen	456
Rowell v. Rowell	114

	PAGE		PAGE
Rowlls v. Bebb.....	621	Stewart v. Jones.....	601
Royal Victoria v. Richards.....	236	Stewart v. Rhodes.....	365
Rudd v. Lascelles.....	489	Stewart v. Snyder.....	452
Runciman v. Star Line Steamship Company.....	316, 354	Stirton v. Gumer.....	26
Russell v. Saunders.....	358	Stobart v. Forbes.....	725
Ryan, In re.....	640	Stokes v. Spencer.....	702
Ryan v. Caldwell.....	315	Street v. Street.....	442
Ryan v. Corporation of Carleton Place	338	Stroud v. Wiley.....	638
Ryan v. Willoughby.....	305	Struthers v. Town of Sudbury.....	307
		Sturgeon Falls Electric Light and Power Co. v. Town of Sturgeon Falls.....	710
St. Boniface Election, In re.....	245, 426	Sullivan v. Jackson.....	318
Saccharin Corporation v. Quincy.....	627	Sumner v. Cole.....	450
Sale v. Lake Erie & Detroit R.W. Co.	457	Suris v. Registrar of Probates.....	497
Salton v. New Beeston Cycle Co.....	149	Swaize v. Swaize.....	65
Sanders-Clark v. Grosvenor Mansions Co.....	670	Sydney Cheese and Butter Associa- tion v. Brower.....	314
Santley v. Wilde.....	19	Synge v. Synge.....	663
Sawyer v. Robertson.....	342		
Scott v. Lord Provost of Glasgow....	56	Tait v. Jackson.....	345
Scott v. Melady.....	308	Talbot v. Guilmartin.....	449
Seaton v. Burnand.....	372	Tallerman v. Dowsing Radiant Heat Co.....	118
Sebert, In re, v. Hodgson.....	456	Tanner v. Weiland.....	312
Segsworth v. McKinnon.....	345	Tate v. Hennessey.....	427
Sharland, In re.....	50	Teacher v. Calder.....	55
Shaw v. Holland.....	665	Tebb v. Cave.....	440
Shawnigan Lake Lumber Co. v. Fair- full.....	70	Tew v. Routley.....	132
Short v. Federation Brand Salmon Canning Co.....	36	Thiery v. Chalmers.....	151
Shrand v. Eastern Canada Savings Co.....	715	Thistle, In re.....	243
Shrimpton v. Winnipeg.....	356	Thomas v. Sutters.....	119
Shuttleworth v. Murray.....	487	Thompson v. McCrae.....	384
Sickert v. Sickert.....	16	Thompson v. Matheson.....	416
Silkstone & H. M. Coal Co. v. Edey..	210	Thomson v. Clanmorris.....	20, 483
Sills v. County of Lennox and Addin- gton.....	159	Tilbury West. Township of, v. Town- ship of Romney.....	600
Sinclair v. Preston.....	469	Tilley v. Confederation Life.....	247
Sleigh v. Tyser.....	661	Tolton v. MacGregor.....	602
Smith v. Baxter.....	622	Toronto, City of, v. Metropolitan R. W. Co.....	131
Smith v. Butler.....	408	Torrance v. Cratchley.....	134
Smylie v. The Queen.....	310	Traves v. City of Nelson.....	38
Snark, The.....	329	Trench, In re, Tubeless Tyre Co.....	366
Snell v. Toronto Railway Company..	311	Trinidad, The, Asphalt Co. v. Ambard	60
Snider v. McKelvey.....	420	Trusts, In re, of Abbott, Smith v. Abbott.....	666
Solicitors, In re.....	679	Trusts and Guarantee Co. v. Hart....	161
South African Breweries v. King.....	298	Trusts and Guarantee Co. v. Trusts Corporation of Ontario.....	215
Soy King, In re, an Infant.....	575	Tucker v. Young.....	63
Spahr v. North Waterloo Ins. Co.....	234	Tufts v. Poness.....	460
Spears v. Fleming.....	166	Turnbull, Re, Turnbull v. Nicholas...	210
Stackhouse, In re.....	725	Turney, In re, Turney v. Turney.....	92
Standard Life Assurance Co. v. Tru- deau.....	337	Turtle v. Township of Euphemia.....	135
Stanley v. Litt.....	102	Tuttle v. McDonald.....	642
Stanley v. Wild.....	205	Tyne & Blythe Shipping Co. v. Leech	440
Starr, Son & Co. v. Royal Electric Co.	449		
Stead, In re, Witham v. Andrew.....	225	Uffner v. Lewis.....	417
Steamship, The, Isis Co. v. Bahr.....	671	Union Bank v. Code.....	419
Stella, The.....	482	Union Bank v. Morris.....	419
Stewart v. Canadian Pacific Railway Company.....	140		

Table of Cases.

xi

	PAGE		PAGE
Union Bank of Canada v. Rideau Lum- ber Co.	164	West v. Diprose.....	300
Union Colliery Co. v. Bryden.....	59	West, In re, George v. Grose... ..	151
Van Buskick, Ex parte.....	315	West Ham. Charity Board v. East London Waterworks Co.....	439
Vanluven, In re, and Walker.....	599	Weston, In re, Davies v. Tagart....	625
Van Wart, Ex parte.....	140	Wheeler, In re, Briggs v. Ryan.....	91
Varley v. Whipp.....	327	Whitby. Town of, v. Grand Trunk Railway.....	572
Vautin, In re.....	660	Whitehead, In re.....	487
Vernon, In re.....	422	Whitelock v. Cook.....	239
Victoria v. Patterson.....	62	Whitewood v. Whitewood.....	343
Vidtz v. O'Hagan.....	52, 621	Wiggins' Estate, In re.....	725
Vimbos, In re.....	369	Wildman v. Tait.....	711
Violet v. Martin.....	139	Williams v. Scott.....	700
Vizetelly v. Mudie's Library.....	444	Williams v. Town of Cornwall.....	708
Wakefield v. Wakefield.....	343	Williams v. Williams.....	208
Walker v. Foster.....	302	Wilson v. Donald.....	36
Wallis & Barnard's Contract.....	20	Wilson v. Fleming.....	599
Walters v. Green.....	88	Wilson v. Owen Sound Portland Cement Co.....	421
Walter v. Lane.....	93	Wilson v. Windsor Foundry Co.....	645
Ward v. Township of Welland.....	24	Windsor Fair Grounds and Driving Park Ass. v. Highland Park Club.....	165, 233
Ward v. Wallis.....	407	Wintemute v. Brotherhood of Railway Trainmen.....	455
Warren, In re... ..	444	Wood v. Canadian Pacific Railway Co.	63
Warwick v. The County of Simcoe...	461	Wooliver, Re, and The County of Kent	164
Wasteneys v. Wasteneys.....	672	Wride v. Dyer.....	115
Waters v. Manigault.....	336	Wright v. Shattuck.....	143
Wellborne, In re.....	492	Wrigley Estate, Re.....	595
Welsbach Incandescent Light Co. v. New Incandescent Lighting Co....	491	Wyman v. Paterson.....	494
Welsbach Incandescent Light Co. v. New Sunlight Co.....	588	Young v. Dominion Construction Co.	240, 287
Welsh v. West Ham.....	227	York, County of, v. Rolls.....	126
Wentworth v. Mathieu.....	377	Yorkshire Guarantee Corporation v. Edmunds.....	726
Wentworth v. Wentworth.....	373		

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NOS. 1 AND 2.

The Yukon Territory, as defined by the Act 61 Vict., c. 6, has been erected into an Admiralty District of the Exchequer Court of Canada, by order of His Excellency the Governor General in Council. The Local Judge, District Registrar, and other officers, have not yet been appointed. Mr. Chas. Morse, B.C.L., senior clerk in the Central Registry of the Exchequer Court, has been appointed Deputy-Registrar of the Court.

Mrs. Merrie H. Abbott was recently elected a prosecuting attorney in the State of Michigan. Her election was contested, and the Michigan Supreme Court decided that she was ineligible for the office, and her election was therefore declared void on the ground that according to the law of Michigan women cannot vote for public offices, such as prosecuting attorney ; and where the law is silent respecting qualifications for office, it must be understood that electors are eligible, but no others. We fear that the electors were making merry with Mrs. Abbott.

No one will question the enterprise of our American cousins. We are glad, moreover, that they know a good thing when they see it, though occasionally it takes them some time to do so. In our issue, for October 16th, we referred to a case on punctuation in the construction of statutes, giving our own summary thereof. We notice that the *Central Law Journal*, on December 1st, copies this summary word for word, leaving out, however, the place where the report of the case is to be found. We are glad to be able to help our brethren in the States editorially, and do not feel at all offended at their taking our work and giving it as their own. We look upon it as a compliment rather than otherwise.

We are indebted to our above contemporary (and are glad to acknowledge the same) for a note on the case of *Rowe v. Raper* in the Appellate Court of Indiana, in which it was held that the funeral expenses of a deceased minor are not a charge against his estate where he leaves surviving him a father able to pay them.

The Court says: "The deceased left surviving him a father. The claimant was his stepmother. It is insisted by appellant that the funeral expenses which are the foundation of the claim are not a charge against the estate. This position is supported by authorities." The Court after referring to these authorities cites Schouler on Dom. Rel. sec. 242, where it is stated that "A father is, in general, liable for the funeral expenses of his deceased minor child; citing *Blair v. Robinson*, 108 Pa. St. 249; *Sullivan v. Horner*, 41 N.J. Eq., 299, 7 Atl. Rep. 441. The foregoing is the general rule. When the parent has not property of his own to support his minor child, resort may be had to the property of the child for such purpose, but such condition must first be made to appear before such a resort can be had. With equal reason, a claim may be enforced against the estate of the minor for funeral expenses when the father is unable to pay them."

We may also observe that in a certain case in Ontario (*Wright v. McCabe*, 35 C.L.J. 233; 30 O.R. 396) the duty of a parent to support his infant child is declared not to be a legal liability, but only a moral one. Sec. 210 of the Criminal Code, however, seems to assume that in some parts of the Dominion it is a legal debt. We might also in connection with the above call attention to a case (*Re Gibbons*, noted post p. 23) wherein it was held, that where on the death of a married woman, whose husband was insolvent, and had left for parts unknown, a friend of the wife's assumed responsibility for the funeral expenses, the payment thereof was held to be a charge on the wife's estate and to be payable thereout.

In these days of accident insurance, a branch of business coming more and more into notice by reason of the various modern devices for shortening life, such as bicycles and other matters of nineteenth century enterprise, it may be of interest to note the following case, referred to by one of our American Exchanges. The deceased was insured against a "bodily injury sustained by external violence and accidental means." It was said that his death was caused by "hard pointed masses of food which perforated the intestines." A Judge of the United States Circuit Court of Vermont held that this was an accidental injury within the meaning of the policy. The food, he said, "was merely placed

where it accidentally caused the injury and that if an accident that persons of ordinary strength would stand, should kill a weak person, or a person of ordinary strength at a weak place, the accident, and not the weakness, should be said to have killed." If death were caused by the accidental swallowing of a bone or some other hard substance we could understand this decision, but if, as seems to be indicated, the deceased were trying an experiment with substances more usually found in the stomach of an ostrich we should be inclined to think he was himself inviting his own funeral. Insurance companies can hardly be expected to contemplate the contingency of the assured eating "hard pointed masses of food which perforate the intestines."

A DOMINION OR ONTARIO CHARTER?

Company promotion has with the arrival of better times been increasing enormously in Canada, and during the past few months the wave has attained such proportions in Ontario, that it may be stated by way of illustration on the best authority that the fees received by the Provincial Secretary during the month of October alone amounted to more than the previous average for a whole year.

This increase, of course, is chiefly due to the outburst of commercial activity, but an explanation may also be found in the easy and efficient machinery provided by the Ontario Government, which affords all the advantages of the registration system, while control is still retained.

The question is frequently asked by company promoters as to the comparative advantages of incorporation under a Dominion or Ontario charter respectively, and while some of the main features and differences may occur at once to the mind it has seemed to the writer that at the present time it may be of some practical service to set out briefly what the respective advantages and disadvantages are in the main.

1. Time : If this is of importance to the promoters it should be noted that an advertisement of an intended application for a Dominion charter must be inserted in the *Canada Gazette* for six insertions or nearly six weeks previous to the application, while in Ontario no such advertisement is now necessary, As a general

rule it may be said that a Dominion charter can be obtained in about two months and an Ontario charter in three weeks.

2. **Expense :** The fee for a Dominion company with a capital of \$1,000,000 or upwards is \$500, for an Ontario company \$385. There is, however, an additional expense required by the Dominion regulations for advertising, etc., which considerably increases the cost.

3. **Value of the Charter :** The constitutional question is sometimes discussed as to the respective rights of the Provinces and the Dominion to give charters under the B.N.A. Act, but this is not very seriously regarded. In many cases, however, it is not improbable that a Dominion charter would be regarded as of greater value in England or foreign countries than a charter with apparent Provincial limitations and this may, in some respects, be a factor of some importance.

4. **Payment of Stock :** Under the Dominion Act R.S.C., c. 119, before letters patent will issue not less than half of the total proposed capital stock must be actually subscribed and at least ten per cent. of the stock so taken must be actually paid in. All stock will also be deemed to have been issued and to be held subject to the payment of the whole amount in cash unless otherwise agreed upon by a written contract filed with the Secretary of State before the issue of the shares (sec. 27) a provision similar to that found in the English Act.

Under the Ontario regulations ten per cent. of the stock must be subscribed for (this is a departmental regulation and will not be found in the statute) but nothing need be paid in at the commencement, the only requirement being that ten per cent. of the allotted stock must be called during the first year. If the stock subscribed for is not paid for in cash but is paid for in kind such as good will, patents, plant, business, merchandise, etc., the agreement evidencing such arrangement need not be filed with the Government as under the Dominion Act. There is no section similar to sec. 27 of the Dominion Act.

5. **Directors :** The Dominion Act requires that the majority of the directors must be residents of Canada ; there is no such limitation in the Ontario Act.

6. **Annual Statements :** Returns of a somewhat long and elaborate nature must be made by every Ontario company to the

Government before the 1st of February in every year—no such returns are required by the Dominion Government.

7. Name : It has been suggested, as pointed out, that an Ontario charter may possibly be confined to provincial objects and it is sometimes difficult to obtain the consent of the Provincial Government to the use of a general expression such as "Canadian" or "Dominion" in the name of the company. There is no statutory enactment as to this, but it is a departmental regulation. It may here be noted that the use of the word "Royal" is not allowed without a special license from the Home office.

8. Preference Stock : The Dominion Companies Act did not provide for a creation of preference stock but this has been remedied by 62 & 63 Vict., c. 40, in a section almost verbatim with the Ontario provision on this point, except that the Dominion Act requires that the meeting authorizing such preference stock must represent two-thirds of the stock of the company.

9. Increase of Capital : A Dominion company may increase its capital when the whole is subscribed and fifty per cent. paid up. An Ontario company may do so when nine-tenths has been subscribed and ten per cent. paid up.

10. Minor Points : (1) A Dominion charter will be forfeited if the business is not entered on within three years or for non-user for same period ; in the case of an Ontario charter two years is the time limit.

(2) Both Acts require the use of the word "Limited," but Ontario companies must use the word unabbreviated.

(3) The Ontario Act excludes loan corporations from the operation of the Act while the Dominion Act requires that the capital of a loan company shall not be less than \$100,000.

(4) The Dominion Act limits the amount which may be borrowed by a company to seventy-five per cent. of the paid up stock of the company ; there is no such limitation in the Ontario Act.

(5) Directors of a Dominion company are liable for wages for six months, but in the case of an Ontario company for twelve months.

(6) Holders of proxies under the Dominion Act must be shareholders, whilst there is no similar restriction in the Ontario Act.

(7) The prospectus of a Dominion company must specify the

contracts entered into by or for the company. As to the prospectus of an Ontario company, see the Directors' Liability Act, R.S.O., c. 216.

The above sketch though not exhausting all the minor differences between the two Acts will perhaps be found to set out in a convenient form the chief points of contrast and those characteristics which may be important to bear in mind in weighing the comparative value of the two charters.

CHARLES MACINNES.

Toronto.

COLLATERAL NEGLIGENCE.

When a principal employs an independent contractor to perform a work and a third party is injured in its performance, through the negligence of the contractor or his servants, such negligence is said to be collateral to the work which the contractor was engaged to do, and the principal is not liable, if he parted with control over the work in course of its being carried out and interfered in no way at any stage of the process. The reason of the rule is that the damage arises from a collateral or casual omission not ordinarily incident to the work.

Like all general rules, however, the rule above stated is subject, to several exceptions Chief among them is the following :—Where the work interferes with the rights of others and thus casts upon the principal the duty of seeing it properly executed, he cannot escape responsibility by delegating the performance of that duty to another. This branch of the doctrine of respondeat superior is thus clearly expressed by Wills, J., in the recent case of *Holliday v. National Telephone Company* (1899) 1 Q. B. 227. "There are many cases in which a person who employs another to do the work for him is not exempted from liability for accidents arising out of such work, because he has employed an independent person and has not retained any control over processes or details, nor even interfered in any way with the work at any stage. If a person orders a thing to be done which when done, or as done, is an interference with the safety or rights of another who at the time he is injured is in the exercise of his lawful rights, it is no answer to say, that the person for whom the offending thing has been done has procured it to be done by

virtue of a contract with some one independent of his interference or control. * * * The man who disturbs, or who fails to create, a state of things which other people have a legal right to expect at his hands, is liable for such disturbance or failure. The man who maintains an insecure weight hanging over the heads of passers-by and fails in taking care that it shall not expose them to danger; the man who contracts a right of way, vertically or laterally, which the public have a right to enjoy in all its old height or width, and the man who digs a hole in a place where others have a right to expect no hole, disturbs a state of things to which they have a legal right, and does it at his peril, if an accident happens by reason of what has been done. In the same way, if the hole deprives a neighbouring house of support to which it is entitled, the disturbance of the status quo is at the risk of him who brings it about."

The above case affords a striking illustration of the fact, that while judges may give a clear exposition of the law, they often egregiously err in applying it to the facts of a particular case. The facts were briefly these:—The defendants were lawfully engaged in laying down telephone wires under the pavement of a street. The soldering of the joints connecting the tubes which held the wires was let to an independent contractor. The plaintiff was injured by the explosion of a safety lamp used in soldering, through the negligence of a servant of the contractor. The Deputy Judge of the City of London Court, who tried the case without a jury, gave judgment for the plaintiff for an agreed sum of £25. On appeal, it was held, that the defendants were not liable, on the ground that the negligence of the contractor's servant was collateral to the execution of the work which the contractor was employed by them to do. Wills, J., in delivering the judgment of the court, designates the negligence that wrought the mischief as "about as typical an instance of negligence merely casual, collateral, or incidental, as can well be conceived."

This judgment of the Divisional Court was reversed in the Court of Appeal (1899) 2 Q. B. 392. Lord Chancellor Halsbury at page 399 remarking: "It appears to me that the telephone company, by whose authority alone these works were done, were, whether the works were done by the company's servants or by a contractor, under an obligation to the public to take care that

persons passing along the highway were not injured by the negligent performance of the work."

Lord Justice Smith, at page 400, gave his opinion that :—" Since the decision of the House of Lords in *Hughes v. Percival*, 8 A. C. 443, and that of the Privy Council in *Black v. Christchurch Finance Co.* (1894) A. C. 48, it is very difficult for a person who is engaged in the execution of dangerous works near a highway to avoid liability by saying that he has employed an independent contractor, because it is the duty of a person who is causing such works to be executed to see that they are properly carried out so as not to occasion any danger to persons passing by on the highway. I do not agree that this was a case of mere casual and collateral negligence within the meaning of that term, for it was negligence in the very act which Hignmore was engaged to perform."

In considering the cases on this branch of the law, the following general rules should be borne constantly in mind :—First—When a contractor is employed by a principal to do a work, lawful in itself, not necessarily involving injurious consequences to others, and damages result to another, from the negligence of the contractor or his servants, the contractor and not the employer is liable. Second—On the other hand, if the work to be done is of such a description as requires the consent of constituted authority for its performance, or of such a nature as injurious consequences must be expected to arise, unless means are adopted to prevent them, the employer is bound to see to the doing of that which is necessary to prevent the mischief, and cannot escape liability, if injury is sustained by a third party, by a transference of that duty.

Collateral negligence as a distinct branch of law did not take shape and become definitely settled until 1840, in the leading case of *Quarman v. Burnett* 6 M. & W. 499. Lord Blackburn in reviewing the cases in *Dalton v. Angus* thus refers to it :—" Ever since *Quarman v. Burnett*, it has been considered settled law that one employing another is not liable for his collateral negligence, unless the relation of master and servant exists between them." A consideration of the leading cases, during the past hundred years, shows how gradually its underlying principles have been evolved, until now they are firmly bedded in our legal system. In *Bush v. Steinman*, (1799) 1 B. & P. 404, the owner of a house employed a surveyor to do some work upon it ; the surveyor in

turn contracted with another to do the job, who again contracted with still another to furnish the materials. The servant of the last sub-contractor brought a quantity of lime to the house and left it on the road, by which the plaintiff's carriage was overturned and plaintiff injured. Under this state of facts, the court unanimously held, that he who had work going on for his benefit, and on his premises, was civilly answerable for the acts of those engaged in this work. The reason of the decision was, that it should be intended by the court, that he had control over all persons who worked on his premises, and he should not be allowed to discharge himself from that intendment of law by any contract of his own. Eyre, C.J., had misgivings as to the decision, feeling a difficulty in stating the precise principle on which the judgment was founded, yet he was satisfied with the opinion of his brothers. The ratio decidendi, in this case, proceeded rather upon the argumentum ab inconvenienti, than sound legal principle—that the remedy should be obvious, and the person injured compelled only to look to the owner of the house and not to enter into the concerns between that owner and other persons.

In 1826, the question was again carefully considered in *Laugher v. Pointer* 5 B. & C. p. 547, all of the authorities having been exhaustively reviewed. In this case, the owner of a carriage hired a stable keeper a pair of horses to draw it for a day, the owner of the horses providing the driver, through whose negligent driving injury was done to a horse belonging to a third party. The court was equally divided, Abbott, C.J., and Littledale, J., holding that the owner of the carriage was not liable, Bayley and Holroyd, JJ., contra. Thus the law stood until 1840, when *Bush v. Steinman* was over-ruled by *Quarman v. Burnett*, 6 M. & W. 499. The facts in the last named case were similar to those in *Laugher v. Pointer*. Parke, B., in delivering judgment, said :—“ Upon the principle that qui facit per alium facit per se, the master is responsible for the acts of his servant ; * * * and whether such servant has been appointed by the master directly, or intermediately through the intervention of an agent authorized by him to appoint servants for him, can make no difference. But the liability, by virtue of the principle of relation of master and servant, must cease where the relation itself ceases to exist ; and no other person than the master of such servant can be liable, on the simple ground, that the servant is the servant of another, and

his act the act of another ; consequently, a third person entering into a contract with the master, which does not raise the relation of master and servant at all, is not rendered liable ; and to make such person liable, recourse must be had to a different and more extended principle, namely, that a person is liable not only for the acts of his own servant, but for any injury which arises by the act of another person, in carrying into execution that which that other person has consented to do for his benefit."

In *Reedie v. The London and North-Western Railway Company* (1849) 4 Ex. 243, the defendants were held not to be liable where the workman of a contractor under the company had, in constructing a bridge over a public highway, negligently caused the death of a person passing beneath along the highway, by allowing a stone to fall upon him, although the company by their terms of agreement had reserved to themselves the power of dismissing any of the contractor's workmen for incompetency.

In *Murray v. Currie*, L.R. 6 C.P.D. 24, decided in 1870, Willis, J. said :—" I apprehend it to be a clear rule, in ascertaining who is liable for the act of a wrong doer, that you must look to the wrong doer himself or to the first person in the ascending line who is the employer and has control over the work. You cannot go further back, and make the employer of that person liable."

In *Bower v. Peate* (1876) L.R. 1 Q.B.D. 321, the plaintiff and defendant were respective owners of two adjoining houses, plaintiff being entitled for support of his house to defendant's soil. Defendant employed a contractor to pull down his house, excavate the foundations, and rebuild the same. The contractor undertook the risk of supporting plaintiff's house, as far as might be necessary during the work, and to make good any damage arising therefrom. Plaintiff's house was injured during the progress of the work owing to the means taken by the contractor to support it being insufficient. The court held defendant liable, on the ground, he was bound to see to the doing of that which was necessary to prevent the mischief, and he could not relieve himself of his responsibility by employing some one else to do what was necessary to prevent the act he had ordered to be done from becoming wrongful.

In *Hughes v. Percival* (1883) 8 Ap. Cas. 443, the defendant pulled down his house and had it rebuilt on a plan which involved in it the tying together of the new building and the party wall

which was between the plaintiff's house and the defendant's, so that if one fell the other would be damaged. The plaintiff's house was destroyed by the negligent performance of the work which had been let to a contractor. It was held, that the defendant could not shift the liability the law cast upon him of seeing that reasonable care and skill were exercised in the operation. Lord Fitzgerald, in his judgment, asks :—"What is the law applicable?" "What was the defendant's duty?" And then proceeds to answer these questions in manner following : "The law has been varying somewhat in the direction of treating parties engaged in such an operation as the defendant's as insurers of their neighbours or warranting them against injury. It has not, however, reached quite to that point. It does declare that under such a state of circumstances it was the duty of the defendant to have used every reasonable precaution that care and skill might suggest in the execution of his works, so as to protect his neighbours from injury, and that he cannot get rid of the responsibility thus cast on him by transferring that duty to another."

Pickard v. Smith 10 C.B.N.S. 470, was decided upon a like principle, as was also *Black v. The Christchurch Finance Co., Limited* (1894) L.R. App. Cas. 48. This last named action was brought to recover damages for the act of a contractor of the defendant company in negligently and improperly lighting a fire on its lands and permitting it to spread to the plaintiff's lands, causing injury. Lord Shand, in delivering the judgment of the House of Lords, said :—"The lighting of a fire on open bush land, where it may readily spread to adjoining property and cause serious damage, is an operation necessarily attended with great danger, and a proprietor who executes such an operation is bound to use all reasonable precautions to prevent the fire extending to his neighbour's property (*sic utere tuo ut alienum non lædas*). And if he authorizes another to act for him he is bound, not only to stipulate that such precautions shall be taken, but also to see that those are observed, otherwise he will be responsible for the consequences."

In *Hardaker v. Idle District Council* (1896) 1 Q.B. 335, the defendant council employed a contractor to construct a sewer for it. Through the neglect of the contractor in its performance the plaintiff was injured. The court held that the council owed a duty to the public (including the plaintiff) so to construct it

as not to injure anyone, and must respond in damages for the injury done.

A like principle was adopted in *Penny v. Wimbledon Council* (1898) 2 Q.B. 212; 34 C.L.J. 686. The contractor employed by the defendant to lay down a sewer in a street, left a heap of excavated soil on the highway unprotected and unlighted, over which the plaintiff in the dark stumbled and was hurt. Judgment passed for the plaintiff. At page 217 Bruce, J., is reported as saying:—"The principle of the decision, I think, is this, that when a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken cause damage to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and that, if the necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor." The judgment of Bruce, J., was affirmed on appeal (1899) 2 Q.B. 72; 34 C.L.J. 671.

The Lark (1899) Q.D. 74 followed *Hardaker v. Idle District Council* and *Penny v. Wimbledon Council*.

The main proposition, that one is not liable for the negligence of a contractor employed by him is subject to the further exception, that where a statute confers a power and imposes a duty as to the manner of its execution, and by neglect injury is caused, the party aggrieved has his remedy against the employer. This branch of the law was very clearly laid down by Wilde, B., in *Hole v. The Sittingbourne and Sheerness Railway Company*, 6 H. & N. 488. In this case Parliament empowered the defendant company to construct a railway bridge across a navigable river. To do this work, the defendant employed a contractor. From some defect in its construction, it could not be opened, and the plaintiff's vessel was prevented from navigating the river. It was held the defendants were liable for the damage caused to the plaintiff. The learned Baron in his judgment said:—"The distinction appears to me to be that, when work is being done under a contract, if any accident happens, and an injury is caused by negligence in a matter entirely collateral to the contract, the liability turns on the question whether the relation of master and servant exists. But when the thing contracted to be done causes the mischief, and the injury can only be said to arise from the authority of the employer, because the thing contracted to be

done is imperfectly performed, there the employer must be taken to have authorized the act, and is responsible for it. The present defendants were authorized to take land for the purpose of their railway, and to build a bridge over the swale. Instead of erecting the bridge themselves, they employed another person to do it. What was done was under their authority. In the course of executing their orders, the contractor, by doing the work imperfectly, obstructed the navigation. It is the same as if they had done it themselves. It is not distinguishable from the case where a land owner orders a person to erect a building upon his land which causes a nuisance. The person who ordered the structure to be put up is liable, and it is no answer for him to say that he ordered it to be put up in a different form." In 1864, the like doctrine was held in *Gray v. Hubble* 5 B. & S. 970. The defendant was authorized by constituted authority to cut a trench across a highway, for the purpose of making a sewer from his premises. The plaintiff fell into the trench and was injured. It was held the defendant was liable, notwithstanding he had employed an independent contractor to do the work, on the ground that a statutory obligation was imposed upon him and the duty rested with him to see it properly executed.

A further exception to the general rule arises where the act is wrongful or unlawful, and mischief arises from the negligence or misconduct of the contractor. In such a case the employer is liable for the injury done. Lord Campbell, C.J., in delivering judgment in *Ellis v. The Sheffield Gas Consumers Company* 2 E. & B. 767, 1853, said :—"But in the present case the defendants had no right to break up the street at all ; they employed Watson Brothers to break up the streets and in so doing to heap up the earth and stones so as to be a public nuisance ; and it was in consequence of this being done by their orders that the plaintiff sustained damage. It would be monstrous if the party causing another to do a thing were exempted from liability for that act, merely because there was a contract between him and the person immediately causing the act to be done."

The following rules may be fairly drawn from the decided cases on this branch of the law :—

1. That an employer, who engages an independent contractor to do work for him, is not, as a general proposition, liable for the contractor's negligence in its execution, if a third person sustains

injury by the negligent conduct of the work. To this general rule, however, there are several exceptions.

2. The employer, on the contrary, is liable, if he actively interferes or assumes direct and personal control over the contractor or his servants, in the execution of the work, on the principle of the well recognized rule of *respondeat superior*. A mere right to superintend or stop the work if ill-done, or the power to reject it if not rightly done, or the power to discharge the contractor's workmen for incompetency, will not render the employer answerable for the contractor's fault or negligence.

3. The employer is also liable, in case injury is done to a third party by the negligence of the contractor, if the work is of such a character as casts upon the employer the duty of seeing it properly executed.

4. The like responsibility rests upon the employer, as stated in last paragraph, if the work is such as likely to cause damage to others unless effectual means are taken to guard against it.

5. The employer is also liable for injury to a third party by the negligence of the contractor, if the work is unlawful in itself, or is done in contravention of statutory or municipal authority, where leave is required first to be had of such authority.

6. Where a statute or municipal authority empowers the execution of a work and imposes a duty as to the manner of its execution, an obligation rests upon the employer to see it properly done and he cannot escape responsibility, if a third party is injured by the negligent act of a contractor who is entrusted with its performance.

7. If the work necessarily results in the creation of a nuisance or makes a place dangerous which before was safe, then, regardless of the relation which exists between them, the employer is liable for the breach of duty on the part of the independent contractor.

8. Some judges, by virtue of the decision in *Reedie v. The London and North Western Railway Co.* 4 Exch. 244, have held, that even in a case where a duty is cast upon an employer to see the work properly done, he is not liable for an act of negligence, causing injury to a third party, carelessly done by an independent contractor or his servants, which was a mere incident in the course of carrying on the operation and left no tangible result upon the work when completed. This question, however,

has been settled beyond doubt by the judgment of the court of last resort in *Holliday v. National Telephone Company* above referred to.

SILAS ALWARD.

St. John, N.B.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act.)

INSURANCE OF GOODS IN TRANSIT—POLICY—DURATION—CLAUSE ALLOWING DURATION.

In *Hyderabad Co. v. Willoughby* (1899) 2 Q.B. 530, the plaintiffs sought to recover on a policy insuring goods during their transit from India to London. The goods in question consisted of a box containing bars of bullion, and the insurance was "at and from Boodinni to London," including "all risks of every description from the mines by escort to the railway station at Raichur (forty miles) thence by rail (400 miles) to Bombay, thence to London." The policy contained a clause covering the assured in the event of deviation or change of voyage, at a premium to be hereafter arranged." When the box arrived at Raichur in charge of the plaintiff's servant, the railway company improperly refused to accept it except at the owner's risk. The plaintiff's servant was on his way to a place called Secunderabad 170 miles from Raichur, and off the route from that place to Bombay, and took the box there where it was kept for a month in the plaintiff's safe, pending negotiations with the railway company. The company having ultimately agreed to accept the risk of carriage, the box was taken to Raichur, and from thence was forwarded by the prescribed route to London. On its arrival there it was discovered that one of the bars of gold had been abstracted, and Bigham, J., who tried the case found that it had been in fact stolen while the box was in the plaintiff's office at Secunderabad; and the question therefore was whether this was a loss covered by the policy. Bigham, J., held that the deviation was a necessary one under the circumstances, and that the box must be considered still to have been in transit while at Secunderabad, but that an additional premium was payable in respect of such deviation.

COUNTY—LIABILITY FOR EXPENSES OF TROOPS SUMMONED TO PRESERVE PEACE.

In *The Queen v. Glamorgan* (1899) 2 Q.B. 536, the Court of Appeal (Smith, Williams and Rigby, L.JJ.) have affirmed the judgment of the Divisional Court (1899) 2 Q.B. 26 (noted vol. 35, 670) to the effect that a county is not liable to defray the expenses of troops, whose aid is obtained by the municipal authorities for the purpose of preserving the peace.

LOST WILL—PROBATE—PRACTICE—PROOF OF LOST WILL ON MOTION—NEXT OF KIN, CONSENT OF, DISPENSED WITH.

In *the goods of Apted* (1899) P. 272, was an application to prove a lost will on motion, and without notifying or procuring the consent of all of the next of kin. The applicant was the universal legatee and sole executrix named in the alleged will. The estate was of small value, in all £196 5s. Some of the next of kin (a brother and three sisters) had been notified, and made no objection. Barnes, J. entertained the motion, and dispensed with notice to the other next of kin, and granted administration with the will, as contained in the copy annexed, until the original shall be found.

DESERTION—HUSBAND AND WIFE—HUSBAND'S REFUSAL TO LEAD A CHASTE LIFE.

Sickert v. Sickert (1899) P. 278, was a suit for divorce on the ground of desertion. The husband had been guilty of continuous acts of adultery, and refused to give up that course of life, in consequence of which the plaintiff refused to live with him, and it was held by Barnes, J. that such conduct on the part of the husband amounted in law to desertion by the husband.

COMPANY—PROMOTERS OF COMPANY BEING ALSO VENDORS—CONTRACT—SALE BY DIRECTORS OF ONE COMPANY TO THEMSELVES AS DIRECTORS OF ANOTHER COMPANY—RESCISSION.

Lagunas Nitrate Co. v. Lagunas Syndicate (1899) 2 Ch. 392, is a case which gave rise to a difference of opinion in the Court of Appeal. The action was brought by the plaintiff company to rescind a contract of sale under the following circumstances. The plaintiff company was promoted and formed by the directors of the defendant syndicate, for the purpose of purchasing and working nitrate works of the syndicate. The articles of association were prepared by the directors of the syndicate, and stated specifically that the

directors of the plaintiff company nominated in the articles were also directors of the syndicate. The directors of the syndicate also prepared the purchase contract now sought to be rescinded, and affixed the seal of the syndicate and company thereto. Two years after the completion of the contract, certain of the shareholders of the plaintiff company, being of opinion that the property had been purchased at an over value, appointed an independent board of directors, who, after an investigation, authorized the present action, claiming rescission of the contract, or damages for misrepresentation, but not alleging fraud. From the date of the contract, and up to the trial of the action, the plaintiff company had carried on business and worked the property the subject of the contract. Romer, J. who tried the action, directed, as against the defendant syndicate, an inquiry as to damages sustained by the plaintiffs by reason of certain of the property purchased not being in complete working order at the date of the contract as represented, but he was of opinion that on the facts the plaintiffs were not entitled to a rescission of the contract and he dismissed the action as against the directors of the defendant syndicate. On appeal from this judgment the majority of the Court of Appeal (Lindley, M.R. and Collins, L.J.) held that at the time of the contract the plaintiff company had notice, by its memorandum and articles of association, that its directors were also vendors or agents of the vendor syndicate, and the mere fact that its directors did not constitute an independent board of directors was not a sufficient ground for setting aside the sale. Also that there had been no misrepresentation or concealment of any material fact at the date of the contract, and they also considered that although the contract and prospectus were misleading in certain particulars which would have entitled the company to repudiate the contract, yet owing to the alteration of the property by its being subsequently worked by the company, the position of the parties had been so changed that they could not be restored to their original position. They also held that the directors of the syndicate had not been guilty of such negligence or breach of trust as to render them liable in damages to the company for the loss sustained. Rigby, L.J., on the other hand, dissented from the other members of the court, and was of opinion that the directors of the syndicate in promoting the plaintiff company and the purchase in question occupied a fiduciary position in regard to the plaintiff, and that the

company was entitled to rescission on the ground that the directors could not validly bind the company by a contract for the sale of their own property, without the company having independent advice, and that the notice in the memorandum and articles of association of the dual character in which the directors were acting, was ineffectual to make valid a contract entered into under such circumstances, and that the company had not lost its rights to rescission by reason of delay, because the time did not run against the plaintiff company whilst it was dominated by the directors of the syndicate, nor yet by the alteration of the property by its working, which he held to be the act of the vendor syndicate by its directors.

COSTS - APPEAL AS TO COSTS—DISCRETION—PRACTICE—JUDICATURE ACT 1873, (36 & 37 VICT., C. 66) s. 49—RULE 976—(ONT. JUD. ACT, s. 72)—(ONT. RULE 1130.)

Bew v. Bew (1899) 2 Ch. 467, was an action brought by a husband against his wife to obtain a declaration that in respect of certain moneys invested on mortgage in the wife's name, she was trustee thereof for the plaintiff. The wife denied the trust, and died pending the action, and the suit was revived against her executors. Kekewich, J. who tried the action, made the declaration asked by the plaintiff, but ordered that the defendant's costs (including the costs, charges and expenses of the deceased wife) as between solicitor and client, should be paid out of the trust fund which had been paid into court. The plaintiff appealed from so much of the judgment as gave the defendants as trustees, costs charges and expenses of the action as between solicitor and client, on the ground that the wife had denied the trust, and that the judge at the trial had assumed that the costs were not in his discretion. The Court of Appeal (Lindley, M.R. and Jeune, P.P.D. and Romer, L.J.) held, that under the rule laid down in *The City of Manchester*, 5 P.D. 221, the appeal would lie without leave, on the ground that although the costs were in the discretion of the judge at the trial, yet he had disposed of them on the supposition that his discretion was excluded, and on this point they refused to follow *Charles v. Jones*, 33 Ch. D. 80, but the Court of Appeal thought that where an order is made for payment of "costs, charges and expenses" no appeal can be had as to the costs, if the order as to charges and expenses is not appealable. In the result the judgment of Kekewich, J. was varied as to costs, by directing

the defendants to pay the plaintiff's costs of the action, and limiting "the costs and charges and expenses" to be paid out of the fund to those incurred by the deceased wife as trustee of the fund.

MORTGAGE—COLLATERAL ADVANTAGE—CLOG ON REDEMPTION.

Santley v. Wilde (1899) 2 Ch. 474, is another decision bearing on the question of the right of a mortgagee to stipulate for collateral advantages over and above the repayment of his principal and interest. In this case the Court of Appeal (Lindley, M.R., Jeune, P.P.D. and Romer, L.J.) have seen fit to reverse the decision of Byrne, J. (1899) 1 Ch. 747, (noted ante vol. 35, p. 486). The stipulation objected to as being a clog on the equity of redemption was one for the payment of one-third of the profits of the mortgaged property (a theatre), in addition to the repayment of the principal advanced and interest thereon at 6 per cent. in twenty equal quarterly payments. Byrne, J. held that the stipulation for the payment of the profits was invalid, but the Court of Appeal considered the case covered by *Biggs v. Hoddinott* (1898) 2 Ch. 307 (noted ante vol. 34, p. 773), and upheld the stipulation. It may be observed that the mortgage security was a leasehold, and was of a somewhat risky character, a fact which is commented upon by Lindley, M.R. and Jeune, P.P.D. as justifying the mortgagee's bargain, but, in the absence of any unfair dealing or over-reaching by a mortgagee, the question of the character of the security may be found to have very little to do with the legal validity of such contracts.

COMPANY—SHARES ISSUED AS FULLY PAID—SUFFICIENCY OF CONTRACT FOR PAYMENT FOR SHARES OTHERWISE THAN IN CASH—COMPANIES ACT, 1867 (30 & 31 VICT., c. 131) s. 25—(R.S.C. c. 119, s. 27.)

In re African Gold Co. (1899) 2 Ch. 480, involved a question as to the sufficiency of an implied contract for the issue of shares as fully paid up, for a consideration other than cash. Wright, J. held that the filed contract need not disclose the agreement in all its details, but that the statute (30 & 31 Vict. c. 131) s. 25, (see R.S.C. c. 119 s. 27) is sufficiently complied with if the contract shows the nature of the consideration other than cash, which is to be given. This decision was affirmed by the Court of Appeal (Lindley, M.R., Jeune, P.P.D. and Romer, L.J.)

In re Robert Watson (1899) 2 Ch. 509, Kekewich, J. holds that

the nature of the consideration must appear in the contract filed, and not merely by reference therein to some other document which is not filed, e.g. a statement that the consideration is the sale to the company of property the general nature of which did not appear on the face of the contract was declared to be insufficient.

VENDOR AND PURCHASER—TITLE—PRACTICE—VENDORS' AND PURCHASERS' ACT, 1894 (37 & 38 VICT., c. 78), s. 9 (R.S.O. c. 134, s. 4)—FORM OF CONVEYANCE—COVENANTS.

In re Wallis & Barnard's Contract (1899) 2 Ch. 515, was an application under the Vendors' and Purchasers' Act, 1873 (see R.S.O. c. 134, s. 4), in which Kekewich, J., discusses the proper practice to be pursued under the Act. In his opinion, it is not proper to ask the court to decide generally whether a title is good or bad, but merely to present some particular question arising on the title for the decision of the court, and it is quite obvious that if it were otherwise, the court would practically be turned into a Master's office, and he holds that applications asking a declaration that a vendor has shewn a good title, or has not shewn a good title, are unwarranted by the Act. Such declarations, he considers, can only be properly made in specific performance actions. The present application, he held, was properly framed in that it simply asked the court to decide whether or not the purchaser was entitled to a particular covenant. The contract expressly stated that the land was sold subject to a certain restrictive covenant, but it did not refer to another restrictive covenant to which the land was also subject, and which the vendor now claimed that the purchaser had notice that the land was subject to; but Kekewich, J., held that even if he had, he was entitled to a conveyance in accordance with the terms of his contract, and subject only to the restrictive covenant therein mentioned.

COMPANY—ACTION AGAINST DIRECTOR—DIRECTORS' LIABILITY ACT, 1890 (53 & 54 VICT., c. 64), s. 3—(R.S.O. c. 216, s. 4.)

In *Thomson v. Clanmorris* (1899) 2 Ch. 523, it became necessary to determine whether an action against a director to recover compensation for loss occasioned by misrepresentation in a prospectus, brought under the Directors' Liability Act, 1890 (53 & 54 Vict., c. 64), s. 3, (R.S.O. c. 216, s. 4), was "an action for penalties or

damages given to the party aggrieved by a statute" within the meaning 3 & 4 Wm. IV., c. 42, s. 3. Kekewich, J., held that it was not, and that the statute in question applied only to actions for damages in the nature of penalties, and not to actions, such as the present, to recover compensation for loss sustained by parties who have subscribed on the faith of untrue statements in a prospectus.

MORTGAGE—"ALL MY REAL AND PERSONAL ESTATE"—UNCERTAINTY.—PUBLIC POLICY—VALIDITY.

In re Kelcey, Tyson v. Kelcey (1899) 2 Ch. 530, was an action for administration by a creditor of a deceased person in which the validity of a mortgage executed by the testator on "all my real and personal estate" was disputed, and it was contended that the mortgage was void for uncertainty, and as being against public policy, but Kekewich, J., upheld the validity of the mortgage.

REPORTS AND NOTES OF CASES

Dominion of Canada.

SUPREME COURT OF CANADA.

Que.]

LAFRANCE v. LAFONTAINE.

[Oct. 3.

Estoppel—Acquiescement—Flotable waters—Waterpower—River improvements—Joint user—Easement—Arts. 400, 549, 550, 551 and 1213 Civil Code of Quebec.

In a petitory action by the plaintiffs for declaration of title to a parcel of land on the bank of a flotable river, with certain water powers appurtenant, and the dams, mill-race and privileges thereto belonging, free and clear from any servitude or right of co-ownership, it appeared that the proprietor of the land adjoining plaintiff's, on the lower side, had acquired it for manufacturing purposes, and for a number of years had taken his waterpower through a flume constructed on the river bank in continuation of the plaintiffs' mill-race which brought the water from the dam to the plaintiffs' mills and that, in several deeds and written agreements, there had been acknowledgments of the right of owners of the lower lands to use this water subject to the charge of defraying an equal share of the expense of keeping up the constructions incidental to the utilization of the

waterpower and that both proprietors had, for a number of years, contributed equally towards such expenses.

Held, affirming the judgment appealed from, that, whether the rights so recognized constituted a servitude or a right of co-ownership in the lands upon which the constructions had been erected the plaintiffs had no exclusive right to the enjoyment thereof as against the owner of the lands although they were absolute owners of the strip of land on which the constructions had been made. Appeal dismissed with costs.

Lafleur, Q. C., and *Guillett* for appellant. *Belcourt*, Q. C., and *R. S. Cooke* for respondent.

Quebec.]

HONAN v. BAR OF MONTREAL.

[Oct. 24.

Bar of Province of Quebec—Discipline—Advocates—Want or excess of jurisdiction—Irregular procedure—Domestic tribunal—Powers—Arts. 3504 et seq. R.S.Q.—58 Vict., c. 36 (Q.).

In pursuance of statutory powers, the Bar of Montreal suspended a practising advocate after holding an inquiry into charges against him which, however, had been withdrawn by the private prosecutor before the council had considered the matter. It did not appear that witness had been examined upon oath during the inquiry, and no notes in writing of the evidence of witnesses adduced had been taken, the effect of such absence of written notes being that the appellant had been deprived of an opportunity of effectively prosecuting an appeal to the General Council of the Bar of the Province of Quebec.

Held, affirming the judgment appealed from (Q.R. 8 Q.B. 26) that the local Council of the Bar of Montreal had jurisdiction to proceed with the inquiry in the interest of the profession, notwithstanding the withdrawal of the charge by the private prosecutor; that a complaint in any form sufficient to disclose charges against an advocate of improperly carrying on trade and commerce and unduly retaining the money of a client, contrary to the by-laws of the local section of the bar, is a matter over which the council of the bar had complete jurisdiction; further a writ of prohibition does not lie to prevent the execution of a sentence of suspension pronounced by the council of a local section of the Bar of the Province of Quebec against a member of that section where the corporation in the exercise of its disciplinary powers had acted within the jurisdiction given to it by statute; and that the omission to preserve a complete record of the proceedings upon the inquiry of the council in the matter or to take written notes of the evidence of witnesses adduced constituted mere irregularities in procedure which were insufficient to justify a writ of prohibition. Appeal dismissed without costs.

McDougall, Q.C., for appellant. *Globensky* for respondent.

Province of Ontario.

COURT OF APPEAL.

HILLIKER v. KNIGHTS OF THE MACCABEES.

*Benevolent society—Non-payment of dues—Forfeiture of benefits—
Life insurance.*

Upon the construction of the special rules of a benevolent society, BURTON. C.J.O., and MACLENNAN, J.A., held that a member had, in consequence of non-payment of dues by him, ceased to be a member and had forfeited his right to benefits, while OSLER and MOSS, JJ.A., took the contrary view. In the result, therefore, the judgment of BOYD, C., in the plaintiff's favour, was affirmed. But see 29 S.C.R. 397.

J. A. Paterson for appellants. *Ball, Q.C.*, and *R. N. Ball* for respondent.

HIGH COURT OF JUSTICE.

Trial of Actions.

Meredith, C.J.]

EWING v. HEWITT.

[June 19, 1899.]

Negligence—Trap-door in sidewalk.

The plaintiff, while walking on the sidewalk in front of the defendant's premises, tripped over a hinge projecting an inch above the sidewalk and broke his leg. The hinge was placed upon the sidewalk by the predecessor in title of the defendant, and formed a portion of two iron doors covering an area under the sidewalk, and used by the defendant for the purpose of getting access to her cellar. A former action brought against the City of Toronto, in which indemnity was claimed over by the city against the present defendant, having failed, in consequence of the plaintiff having failed to establish notice to the city of the alleged obstruction, and the jury having found in the present case that the hinge constituted an obstruction,

Held, that the plaintiff was entitled to succeed, and that the failure in the former action was no bar to his right to recover in the present action.

John MacGregor and *R. G. Smyth* for plaintiff. *A. H. Marsh* and *A. Cameron* for defendant.

Rose, J.]

RE GIBBONS.

[Sept. 30, 1899.]

Funeral expenses—Payable by friend—Charge on estate.

Where on the death of a married woman, whose husband was insolvent, and had left for parts unknown, a friend of the wife's assumed responsibility for the funeral expenses, the payment thereof was held to be a charge on the wife's estate and to be payable thereout.

John Hoskin, Q.C., for administrator and infant. *C. J. Holman, Q.C.*, for creditors.

Boyd, C.]

FAYNE v. LANGLEY.

[Oct. 28, 1899.

Company—Assignment for the benefit of creditors—President and vice-president—Wages—Priority.

Claims for arrears of salary made by persons occupying the position of president and vice-president of a company, such salary being made payable under resolutions duly passed therefore, are valid; and upon the liquidation of the company are payable in priority to the claims of the general body of creditors.

Shepley, Q.C., and F. C. Cooke for plaintiffs. W. H. Blake for defendants.

Ferguson, J.]

LILLIE v. WILLIS.

[Nov. 10, 1899.

Will—Devise over in case devisee dies previous to the death of two parties—Death of one—Estate in fee to devisee.

A testator devised all her real and personal estate to her son in fee, and provided, in case (the son) should die without issue, previous to the death of "my brother and sister" that they should take certain interests. The sister died in the lifetime of the son.

Held, that as the event, the death of the son previous to the death of both brother and sister could not happen the son took an estate in fee simple.

Geo. Wilkie, for the plaintiffs. No one for the other parties.

Divisional Court.]

REGINA v. THE T. EATON CO.

[Nov. 14, 1899.

Trade description—False application of—Quadruple plate—Evidence.

The defendants by an advertisement in a newspaper described certain tea-sets as "quadruple plate," stating that the regular price thereof was \$12.00 a set but would be sold for \$6.00. The purchaser of one of the sets, before making his purchase, inquired, and was informed, that it was one of the tea-sets advertised, and that the advertisement could be relied upon.

Held (ROSE, J., dissenting), that the use of the words "quadruple plate" in the advertisement was an application of false trade description, in that such goods could not properly be described as such, and that there was evidence to shew that the advertisement applied to these goods.

J. R. Cartwright, Q.C., for Crown. J. J. Maclaren, Q.C., for defendants.

Boyd, C.]

WARD v. TOWNSHIP OF WELLAND.

[Nov. 30, 1899.

Municipal corporations—Money by-laws—Recital of existing debt—Invalidity—R.S.O., c. 223, ss. 384, 685 (2).

The Municipal Act, R.S.O., c. 223, by s. 685 (2), after declaring that debentures issued under local improvement by-laws of a municipality, on

the security of special assessments therefor, form no part of the general debt of such municipality, provides that it shall not be necessary to recite the amount of such local improvement debt in any by-law for borrowing money on the credit of the municipality, but that "it shall be sufficient to state in any such by-law, that the amount of the general debt of the municipality as therein set forth" (pursuant to sec. 384 (10)) "is exclusive of local improvement debts secured by special Acts, rates or assessments."

Held, that this concluding clause is directory only, and the omission to observe it will not alone invalidate the by-law.

Bicknell, for the plaintiff. *German*, Q.C., for the defendants.

Boyd, C.] ONTARIO MINING CO. v. SEYBOLD. [Dec. 2, 1899.
Indians and land reserved for Indians—Surrender of Indian lands—Constitutional law—Crown title—Precious metals—B.N.A. Act, s. 109.

By the North-West Angle Treaty, No. 3, whereby certain Indian territory was surrendered to the Dominion Government in 1873, certain lesser reserves in the surrendered lands were to be defined and set aside, and thereafter to be administered and dealt with by the Dominion for the benefit of the Indians making the surrender. It was also provided that lesser reserves might be sold, leased or otherwise disposed of by the Dominion for the use of the Indians, their consent being first obtained. One of such lesser reserves so set apart was known as 38 B., and in 1886, some 600 acres of it were surrendered to the Queen under the Dominion Indian Act of 1880, in trust to sell the same upon such terms as the Dominion Government might deem most conducive to the welfare of the Indians, and to hold the proceeds in trust for the Indians. Part of this 600 acres, being the lands in question, the Dominion Government patented to the plaintiff. But the defendants asserted title in fee simple to the same land by virtue of a provincial patent granted in 1899. Moreover, in negotiating the treaty in 1873, the Dominion commissioners represented to the Indians that they would be entitled to the benefit of any minerals that might be discovered on any of the lesser reserves to be there after delimited.

Held, that the effect of the surrender in 1886 was to leave the sole proprietary and present ownership in the Crown as represented by the Ontario Government, and from it alone could an estate in fee simple be obtained; and although the title of the Crown to the precious metals is distinct from its title to the land, and rests on the royal prerogative, still the beneficial interest therein being vested in the province of Canada at confederation, by virtue of 9 Vict., c. 114 (C.), passed by s. 106 of the B.N.A. Act to Ontario. With these royal mines the Indians had no concern; nor could the Dominion Government make any valid stipulation with them in 1873, which could affect the rights of Ontario.

Plaintiffs' action dismissed with costs, and the Dominion patent held invalid.

Christopher Robinson, Q.C., and J. Bicknell, for the plaintiffs. J. M. Clark, and R. U. Macpherson, for defendants other than Seybold. L. G. McCarthy and Stewart, for defendant Seybold.

Boyd, C., Ferguson, J.] QUEEN v. LANGLEY. [Dec. 2, 1899.
Municipal corporations—By-laws—Transient traders—Sale—Trading stamps—Conviction—R.S.O., c. 223, s. 583, sub-s. 30, 31.

The defendant entered into an arrangement with various retail merchants by which each of them was to receive from him a quantity of "trading stamps" (the property in which, however, was to remain in him), and to pay him fifty cents per 100 of such stamps received, and to give one of these stamps to each customer who purchased for cash ten cents worth of goods, while he, on his part, was to advertise them in certain directories to be distributed by him and also in newspapers. A blank space was left in these directories for pasting in such stamps, and every customer of any of the merchants who brought to the defendant one of the directories with 990 stamps pasted in it was entitled to receive in exchange any one he might select of an assortment of goods kept in stock by the defendant. Apart from this these goods were not for sale.

Held, that these transactions did not constitute a selling or offering for sale by the defendant within the meaning of a municipal by-law, passed under R.S.O., c. 223, s. 583, sub-s. 30, 31, the stamps delivered to the defendant in exchange for his goods being of no value to him. The essence of sale is transfer of property from one person to another for money or money's worth.

J. B. Clarke, Q.C., for defendant. Aylesworth, Q.C., for the prosecutor.

Meredith, C.J., Rose, J.] STIRTON v. GUMMER. [Dec. 5, 1899.
Libel—Evidence—Admissibility—Previous writings—Provocation—Mitigation of damages—Meaning of words.

In libel for two articles which were printed in the defendant's newspaper reflecting upon the character and conduct of the plaintiff;

Held, that an article in another newspaper, published before the first of the alleged libels, purporting to be an account of an interview with the plaintiff in which he made an attack upon the defendant's newspaper by its name, and a letter signed by the plaintiff, published in two newspapers before the second of the alleged libels, in which the defendant's newspaper and the editor thereof—not the defendant himself—were referred to in abusive language, were admissible in evidence upon the part of the defendant, in mitigation of damages. *Percy v. Glasgow*, 22 C.P. 521, followed.

Held, also, per ROSE, J., that editorial articles which appeared on the same day in the newspapers which published the plaintiff's letter, referring to it and to the defendant's newspaper, were admissible too, as furnishing provocation for the second of the alleged libels; MEREDITH, C.J., contra.

In the first of the alleged libels one of the statements made about the plaintiff was "that during an election campaign the party managers had to lock him up to keep him from disgracing them on the stump.

Held, that evidence was admissible on the part of the defendant to explain the meaning of the words "lock him up."

Riddell, Q.C., and *H. Guthrie* for plaintiff. *King*, Q.C., for defendant.

Divisional Court.]

REGINA v. IRELAND.

[Dec. 5, 1899.

Intoxicating liquors—Unlicensed premises—Search for liquor—Right of inspector to take stranger with him—Necessity for warrant—Proof of liquor being sold—Liquor License Act, R.S.O., c. 245, ss. 130, 131.

The right of entry under s. 130 of the Liquor License Act, R.S.O., c. 245, into any inn, tavern, etc., to make search for liquor, is limited to the persons named therein, namely, "any officer, police constable, or inspector;" and it is only under s. 131, on the procuring a warrant as therein provided, that the officer, etc., can take with him a person not being one of those named. Where therefore a license inspector, in proceeding to search the defendant's premises for liquor, took with him a person not being one of those so named, and without having procured a warrant, his act was illegal, and the defendant justified in resisting it; and a conviction for obstructing the inspector in the discharge of his duty was quashed.

The defendant's premises had been licensed as a tavern, but the license had expired, and the only evidence of liquor being sold or reputed to be sold therein was the statement of the inspector that the defendant's bar-room remained the same as before, *i.e.*, the expiry of his license.

Per MEREDITH, C. J. This was not sufficient to satisfy the requirements of the section; and under the circumstances of this case an objection that reasonable grounds had not been shewn for suspecting that some violation of the Act was taking place, or was about to take place, was not tenable.

Haverson for applicants. *Langton*, Q.C., contra.

Meredith, C.J., Rose, J.]

REGINA v. SMITH.

[Dec. 5, 1899.

Municipal corporations—By-law—Regulation of hawkers—R.S.O., c. 223, s. 583, s.-s. 14—Proviso—Negating exception—Conviction—Quashing—Costs.

A by-law of a County Council recited the provisions of sub-s. 14 of s. 583 of the Municipal Act, R.S.O., c. 223, and that it was expedient to enact a by-law for the purpose mentioned in the sub-section; it then went on to enact "that no person shall exercise the calling of a hawker, pedlar, or petty chapman in the county without a license obtained as in this by-law provided"; but the by-law contained no such exception as is mentioned in the proviso to sub-s. 14, in favor of the manufacturer or producer and his servants.

Held, that the by-law was ultra vires of the council, and a conviction under it was bad.

Held, also, following *Regina v. McFarlane* (1897) 33 C.L.J. 119, that the conviction was bad because it did not negative the exception contained in the proviso, and there was no power to amend it, because the evidence did not show whether or not the defendant's act came within it. The conviction was therefore quashed, but costs were not given against the informant.

Trial of actions—Meredith, C.J.]

[Dec. 13, 1899.

MONTGOMERY v. RUPPENBURG.

Specific performance—Lands abroad—Foreign plaintiff—Jurisdiction.

The plaintiff, a resident of Buffalo, agreed in writing with the defendant to exchange certain lands situate in Buffalo for land of defendant situate in Ontario, and now brought this action for a specific performance of this contract.

Held, that the plaintiff having brought his action in this Court and thereby submitting to its jurisdiction, the Court had jurisdiction to decree specific performance.

Collier and Morwood for the plaintiff. *L. C. Raymond* for the defendant.

Meredith, C.J.]

[Dec 13, 1899.

IN RE MEDLAND AND CITY OF TORONTO.

Municipal corporations—Local improvements—Block pavement—Liability to repair—Reconstruction—R.S.O., c. 223, s. 666—62 Vict., sess. 2, c. 26, s. 41.

A city corporation having, by by-law passed in 1888, adopted the local improvement system, a pavement was constructed as a local improvement in 1891, composed of cedar blocks, circular in form and seven inches in length, laid upon a bed of clean gravel, the roadway having been first graded to the proper level, with wooden kerbing on each side of it. The by-law for levying the assessments stated that ten years was the "lifetime" of the pavement. Secs. 664 and 665 of the Municipal Act, R.S.O., c. 223, authorize the passing of by-laws providing for the construction of local improvements and the making of assessments therefor. Sec. 666 provides that "nothing contained in the two preceding sections shall be construed to apply to any work of ordinary repair or maintenance, and all works or improvements constructed under the said sections shall thereafter be kept in a good and sufficient state of repair at the expense of the city generally."

Held, that what the Legislature contemplated was that the initial cost of the construction of the local work or improvement should be borne by the owners of the property benefited by it, but that they should not be

responsible for the keeping of it in repair, that duty being cast upon the municipality generally, and that when it should become necessary to reconstruct the work or improvement, the cost of doing so should be defrayed by the owners of the property benefited by the work of construction.

Held, also, that this duty to repair is imposed upon the municipality for the benefit of those at whose expense the work or improvement has been made; and is not to be confounded with the general duty to repair, which is one towards the public.

Held, also, that this duty ends when it becomes necessary to reconstruct the work or improvement, and that whenever it is in such a condition that practical men would say of it that it is worn out and not worth repairing, no order for repair can be made under the amendment to s. 666 contained in s. 41 of 62 Vict., sess. 2., c. 26.

Semble, that if the dilapidated condition of the payment were due to the municipality having in the past neglected the duty to repair the result would be different, the amending Act of 1899 being applicable to cases where the breach took place before it was passed.

F. A. Hilton and *S. B. Woods*, for applicant. *Fullerton*, Q.C., for the City of Toronto.

Trial of Actions—Meredith, C.J.]

[Dec. 13, 1899.

HORSMAN v. CITY OF TORONTO.

Taxes and assessment—Arrears of taxes—Goods on premises “purchased” from owner—R.S.O., c. 224, s. 135, sub-s. 4 (b).

Held, that the goods purchased from a mortgagee of the owner or person assessed were not goods title whereof is claimed by purchase, gift, transfer or assignment from the owner or person assessed” within the meaning of s. 135, sub-s. 4 (b) of the Assessment Act (R.S.O., c. 224) and could not be levied on for taxes in arrear in respect of the premises owned by the mortgagor of the goods.

Brewster, for the plaintiff. *Fullerton*, Q.C., and *Chisholm*, for the defendants.

Rose, J.]

[Dec. 14, 1899.

HARRIS v. BANK OF BRITISH NORTH AMERICA.

Interpleader—Summary application—Rule 1103 (a)—Money in bank—Adverse claims—Foreign claimants—Foreign action—Jurisdiction.

An appeal by the defendants from an order of the Master in Chambers dismissing a motion, under Rule 1103 (a), for an interpleader order in respect of moneys in the hands of the defendants, which were claimed by the plaintiff, and also by the Pioneer Trading Corporation of the Klondike, Limited, a corporation having their head office in London, England. This

company had not sued and did not intend to sue the defendants in Ontario, but had brought an action in London, England. They objected to any order being made for the purpose of compelling them to litigate their rights in Ontario. A deposit of deeds with the defendants was made at Dawson City, with a direction as to the disposition of them; the money in question was deposited in London, England, and none of the parties had any dealings with each other in the Province; the defendants, however, were sued here by the plaintiff.

Held, that it was not convenient or proper to make an interpleader order; and *semble*, there was no jurisdiction to make one.

In re Confederation Life Association and Cordingly, 19 P.R. 16, *Credits Gerundense v. Van Weede*, 12 Q.B.D. 171, and *Re Benfield and Stevens*, 17 P.R. 339, referred to. Appeal dismissed with costs.

J. Greer, for defendants. *D. O. Cameron*, for plaintiff. *W. H. Blake*, for other claimants.

Rose, J.]

MCCUAIG v. CONMEE.

[Dec. 16, 1899.]

Injunction—Motion to dissolve—Practice.

When an injunction is granted to a day certain and requires a motion to continue in order to extend it beyond such a day, a motion to dissolve is improper, except where it is desired to get rid of the interim order before the day named.

J. H. Moss, for plaintiff. *Rowell*, for defendant. *Corley*, for Rat Portage Lumber Co.

MUNICIPAL LAW.

REG. v. ST. JOHN.

Liquor License Act—Meaning of the word "liquor".

The words "any description of liquor whatever," in s. 78 of the Liquor License Act, R.S.O., c. 245, do not include non intoxicating liquor.

[Hamilton, Nov. 15, 1899.—Snider, Co. J.]

One Bowman, a person apparently under the age of twenty-one years, was supplied with ginger ale by Wellington St. John, on his licensed premises in Hamilton, for which he was convicted by Police Magistrate Jels, under s. 78 of the Liquor License Act, which forbids a licensee supplying such a person with "any description of liquor whatever."

There was an appeal from this conviction to the judge of the County Court of Wentworth.

Haverson, for appellant. *Crerar*, Q.C., contra.

SNIDER, Co. J.—This appeal is not against the finding of facts, but against the learned Magistrate's construction of the words "any description

of liquor whatever," in s. 78 of c. 245, R.S.O. According to the learned Magistrate's finding on the evidence, the defendant in his licensed bar-room sold to a minor ginger ale. For this action he found him guilty of an offence, under s. 78, and fined him \$10.00, holding that the word "liquor" as there used is synonymous with fluid, and is not restricted to intoxicating liquor.

The main object of the Act is to deal with the sale of intoxicating liquors, and in the interpretation clause, s. 2, sub-s. 1, the Legislature defines clearly what is to be understood wherever in the Act the word "liquor" is used. Sub-section 1 is as follows: "Liquors" or "liquor" "shall include all spirituous and malt liquor, and all combinations of "liquors and drinks, and drinkable liquids which are intoxicating," but does not expressly say that it shall not include anything else. It is admitted that ginger ale does not come within these words. The burden is on the Crown to show that in s. 78 the Legislature intended to enlarge this meaning, which they have said in the interpretation clause, the words shall be given. In ordinary acceptance I do not think the word "liquor" is understood to include non-intoxicating liquid. It conveys to the general public, I think, the idea of fluid with intoxicating properties in some degree. See the definition of "liquor" given in the Imperial Dictionary and other dictionaries.

The Legislature sometimes uses the words "intoxicating liquor," and the word "liquor" as interchangeable terms having the same meaning, as for example is s. 22 of this Act, the words "intoxicating liquors" are used, and in the form of conviction for an offence against this and other sections, the word "liquor" alone is used. With all deference, it does not appear to me that the words "intoxicating liquor" are used in s. 25, cited by the learned Magistrate as necessary in order to exclude non-intoxicating liquids from its operation. The word "liquor" alone according to the meaning given it in the interpretation clause would have been equally effective. The same may be said of all the clauses referred to, the word "intoxicating" appearing to be surplusage. On the other hand, it seems to me that in order to extend the meaning given in sub-s. 1 of s. 2, to the word "liquor" so as to include fluids of all kinds, it would be necessary to say so in the most explicit terms.

In s. 125, referred to in the judgment appealed from, the words "intoxicating liquor" are used in the first sub-section thereof, while in sub-s. 2 of this same section, the words "any liquor" are used as meaning exactly the same thing. It would be impossible to give the words used in sub-s. 2 any wider meaning than those used in the 1st sub-section. Sub-s. 1 provides that under certain circumstances there mentioned, a wife, parent, &c., may give notice to any licensed hotel or saloon keeper not to deliver "intoxicating liquor" to the person having the habit of drinking "intoxicating liquor" to excess. Then sub-s. 2 of this s., 125, provides that any person who, with the knowledge of this notice, gives, sells, purchases for or

on behalf of the person, with regard to whom the notice has been served, or for his or her use "any liquor" shall for every such act incur a penalty of not less than \$25.00, nor more than \$50.00. It seems impossible to contend that the words "any liquor" used in this part of the section, providing the punishment, can be given a wider meaning than the words "intoxicating liquor" used in the part of the section providing for the notice. The words "any liquor" are quite as comprehensive, it appears to me, as the words "any description of liquor whatever," used in s. 78. In both sections it comes back to the meaning to be given the word "liquor" alone in this Act, and I do not find, to my mind, any greater evidence of a "contrary intention" on the part of the Legislature to the interpretation given in sub-s. 1 of s. 2, in using the words in s. 78, than I do in their using the words "any liquor" in sub-s. 2, of s. 125, where undoubtedly intoxicating liquor is alone intended.

To enlarge their own definition, the Legislature would, I think, in fairness to the license holder, use unmistakable language. Again in sub-s. 7 of s. 52, the Legislature has used the words "any liquor, or soda water, apollinaris, ginger ale, &c., clearly indicating that the words "any liquor" do not include, and are not intended to include, ginger ale, nor any non-intoxicating fluid. Many other sections of the Act are to the same effect.

In *Northcot v. Brunker*, 14 O. A.R., p. 364, Patterson, J., in discussing the meaning to be given to the word "liquor" says "the word 'liquor' popularly means intoxicating liquor," and further on he says: "As I read the interpretation clause of the statute, the word 'liquor' when used in the Act (the Liquor License Act in force in 1886) not only comprehends intoxicating liquor, but is restricted to that meaning."

The Legislature by the interpretation clause directs expressly what is to be understood by the word "liquor" wherever used in this Act, and with all deference to the learned Magistrate's opinion, and appreciating fully his desire to protect minors from the temptation which naturally attends their being allowed to purchase even non-intoxicating drinks in licensed places, I do not think the Legislature has indicated by the words used in s. 78, an intention to include non-intoxicating drinks. The appeal will, therefore, be allowed with costs.

Province of Manitoba.

QUEEN'S BENCH.

Full Court.]

BRECHLEY v. McLEOD.

[Nov. 20, 1899.

*Appeal from County Court—County Courts Act, R.S.M., c. 33, ss. 330, 315
—Amendment—Final order or judgment.*

In a suit on a promissory note in a County Court, the date of the note

was given in the particulars of claim as March 19, 1892, but the note produced at the trial bore date November 19, 1892, when defendant asked for a nonsuit. Upon plaintiff's application the County Court Judge made an order under s. 330 of the "County Courts' Act" R.S.M., c. 33, giving plaintiff leave to amend, and providing that defendant should have fifteen days to amend his dispute note so as to set up any defence he might have to the amended claim, and that in default thereof, judgment might be signed by plaintiff for the full amount of his claim with costs of court only. Defendant appealed to the Full Court against the order, and when the appeal came on to be heard, counsel for plaintiff took the objection that under s. 315 of the Act, so amended by 59 Vict., c. 3, s. 2, no appeal lies from such an order.

Held, that the order was appealable, as it was not a mere direction in the course of the trial allowing an amendment and trial subsequently proceeded with.

There was to be no further trial, if no new dispute note was filed, and, if one should be filed, there would be another trial altogether.

The order provided for a final disposition of the case in a certain event, and if that event happened, the signing of the final judgment would be the act of the Clerk of the Court, from which there could be no appeal.

The appeal was subsequently heard and dismissed.

Phippen, for plaintiff. *Bonnar*, for defendant.

Full Court.] THE QUEEN *v.* WINSLOW. [Dec. 13, 1899.

Criminal law—Evidence—Withdrawing case from jury—Criminal Code, s. 744.

The prisoner was tried before a judge without a jury, and convicted of having stolen a pocket-book, containing \$3.50 in money from the person of Mrs. D., whilst attending the exhibition at Winnipeg, on July 12th, 1899.

The evidence shewed that Mrs. D. entered the grounds with a number of others, having in her pocket the pocket-book containing the money; that she stopped in a crowd to watch something that attracted attention; that there was a commotion in the crowd, during which the prisoner pushed her or was pushed against her; that just as this occurred a constable saw the prisoner putting his hand into a fold of her dress which he took to be the situation of her pocket; that the pocket-book was missed within a few minutes afterwards, and that the prisoner, being arrested after an interval, had upon him money in bills and silver, some of which were of the denominations in Mrs. D.'s pocket-book, but none of which could be identified as having been hers.

Counsel for the prisoner requested the trial judge to reserve a case for the opinion of the Full Court upon the question whether there was sufficient evidence to have warranted the leaving of the case to a jury, if a jury had been sitting. This being refused, the prisoner with the consent of the

Attorney-General applied for, and obtained leave to appeal under s. 744 of the Criminal Code.

Held, that the evidence did not raise more than a mere suspicion against the prisoner, and was not sufficient in law to warrant a conviction; and that the prisoner should be discharged.

Patterson, for the Crown. *Bonnar*, for the prisoner.

Full Court.]

IN RE DUPAS.

[Dec. 13, 1899.

Practice—Certiorari—Full Court—Master and Servant's Act, R.S.M., c. 96—Criminal matter—Procedure.

This was a motion to the Full Court, upon notice to a Justice of the Peace for a writ of certiorari to remove a conviction of the applicant under the Master and Servant's Act, R.S.M., c. 96, for non-payment of wages, and the applicant contended that, under *Regina v. Beale*, 11 M.R. 448, such a motion could only be brought before the Full Court. Counsel for the justice contended that the Queen's Bench Act, 1895, and its rules, apply to such a case, as it was in no sense a criminal or quasi-criminal matter or proceeding, and that the application might be heard by a single judge.

The Court, without deciding this point, ordered that the motion should be adjourned into chambers, to be heard by a single judge if the parties consented, otherwise that it should be dismissed without prejudice to a motion in chambers.

Haney, for applicant. *Patterson*, for the Justice.

Full Court.]

KENNEDY v. PORTAGE LA PRAIRIE.

[Dec. 22, 1899.

Municipality—Highway—Liability for non-repair—Negligence—Pitch-holes in winter roads—Objections not raised at trial—Municipal Act, R.S.M., c. 100, s. 618.

Appeal from a judgment of the County Court of Portage la Prairie, against the rural municipality of Portage la Prairie, giving damages to the plaintiff for injury to a horse caused by non-repair of a highway by reason of the continued existence of a series of deep pitch-holes produced by traffic in the snow covered surface of a travelled road. There were ten or twelve of these pitch-holes in almost uninterrupted succession at intervals of only a few feet, varying in depth from one to three and a-half or four feet below the level of the travelled snow road, and the descent into them was very steep. The evidence also shewed that the depth of the snow outside the one beaten trail was so great that it was impossible for a loaded sleigh such as the plaintiff was driving to turn out so as to avoid the pitch-holes, and that the defects in the road had existed for a considerable time and could have been remedied by a small expenditure of money.

Held, that, under s. 618 of the "Municipal Act," R.S.M., c. 100, the

defendants were liable for the damages sustained by the plaintiff. *Caswell v. St. Mary's Road Co.*, 28 U.C.R., 247 and *Walker v. City of Halifax*, 16 N.S.R. 371, Cas. Dig. 175, followed.

The liability of the municipality for non-repair being limited to that portion of a road on which work has been performed or public improvements made by the municipality or which has been in some way assumed by it. Objection was taken on the hearing of the appeal that there was no direct evidence that such had been done, but the County Court Judge stated that it was not disputed before him that the municipality was bound to keep the road in repair, and he found that it was a road of very considerable importance leading into the town of Portage la Prairie, and at all times much used. The evidence also showed that from seventy-five to eighty teams passed over the portion of the road in question each way daily about the time of the injury to the plaintiff's horse.

Held, following *Proctor v. Parker*, 12 M.R. 529, that, by not raising the objection at the trial, the defence had waived strict proof of the circumstances rendering the municipality liable to keep the road in repair.

Appeal dismissed with costs, Bain, J., dissenting.

Anderson, for plaintiff. *James and Perdue*, for defendants.

Full Court.] RE ROCKWOOD AGRICULTURAL SOCIETY. [Dec. 22, 1899.

Corporation—Power to mortgage real estate of corporation—Power to borrow—Ultra vires—Construction of statutes.

This was an appeal from the refusal of the District Registrar to register a mortgage given by the Agricultural Society on land subject to The Real Property Act.

Held, that, having regard to the purposes and objects of the society as set forth in section 6 of The Agricultural Societies Act, 55 Vict., c. 2 (M. 1892), under which it had been incorporated, there was no implied power to borrow money or to mortgage real estate belonging to the corporation as the exercise of such power would not be necessary to enable it to carry out its purposes, and it was not in any sense a trading corporation; and, there being no express power given by the statute, the District Registrar was right in refusing to register the mortgage, notwithstanding the provisions of section 9 of the Act prohibiting a sale, mortgage, lease or other disposition of any real property of the society unless authorized at a general meeting of the society. *Brice on Ultra Vires*, p. 222; *Fisher on Mortgages*, p. 136; *The Queen v. Sir Chas. Reed*, 5 Q.B.D. 483, and *Blackburn Building Society v. Cunliffe*, 22 Ch.D. 1, followed; *Bickford v. The Grand Junction Railway Co.*, 1 S.C.R. 7, distinguished.

Held, further, that a subsequent statute empowering a certain municipality to guarantee a loan to the society, "to be effected or procured for the purpose of erecting buildings and the improvement of the grounds of the said society," could not be construed as giving the society any power which it had not before, for a misapprehension of the law by the legislature

has not the effect of making that the law which the legislature had erroneously assumed it to be: *North-West Electric Co. v. Walsh*, 29 S.C.R. 33. *Crawford, Q.C.*, for society. *Wilson*, for District Registrar.

Province of British Columbia.

SUPREME COURT.

Walkem, J.]

WILSON v. DONALD.

[July 31.

Practice—Writ of summons—Service out of jurisdiction—Shares in ship—Receiver—Order XI.

Motion to set aside the service of a writ of summons out of the jurisdiction and to discharge the order allowing the service. The plaintiffs sue on behalf of themselves and all the other execution creditors of one James Morton, and on behalf of the sheriff of Victoria. Morton being the owner of the steamship "Horsa" (registered at Victoria) mortgaged her on the 27th of August, 1898, to the defendant John A. Donald, to secure payment to him of \$15,000.00. After the mortgage was executed, and before it became due, the plaintiffs severally recovered judgments at Victoria against Morton for various sums due to them, principally for supplies to the ship, and placed writs of fieri facias in the sheriff's hands with instructions to seize Morton's equity of redemption in the shares of the ship. Morton having failed to pay off the mortgage, Donald under a power of sale in it, sold the ship on the 31st of December, 1898, to H. P. Saunders of New York, for \$20,000.00, that is to say for about \$5,000.00 over what was due to him. The bill of sale to Saunders was registered at the Custom House, Victoria, on the 16th of January last and the ship left that port,

Notwithstanding the sale to Saunders, it was contended on behalf of the plaintiffs that the equity of redemption in the shares had been seized, and is now held by the sheriff, and that the shares are thus, in effect, now within the jurisdiction of this Court.

Held, (1) That the creditors not having got a receiver appointed of the shares they had passed to the purchaser; (2) that an order for service out of the jurisdiction on the mortgage, could not be made.

Langley for the motion. *G. A. S. Potts* contra.

Full Court.]

[Nov. 28, 1899.

SHORT v. FEDERATION BRAND SALMON CANNING CO.

Practice—Time for appealing—Supreme Court Act, s. 76, and amendment of 1899—Meaning of "refusal of a motion or application."

Appeal to the Full Court from the judgment of DRAKE, J., dismissing the action. The judgment was pronounced on the 26th of April, 1899, and

notice of appeal was served on the 2nd of September. On the appeal coming on before McCOLL, C.J., WALKER and IRVING, JJ., *Wilson*, Q.C., for the respondents took the preliminary objection that the appeal was out of time, as the notice was given more than three months after the pronouncing of the judgment, contending that the dismissal of an action is the refusal of an application, and the time for appealing does not therefore run from the time of signing, entry, or otherwise perfecting of the order, but from the time of refusal.

A. D. Taylor for appellants.

Held (IRVING, J., dissenting), that the time for bringing an appeal from a trial judgment runs from the date of signing, entry, or perfection thereof, as the case may be, and not from the date of pronouncement. *The International Financial Society v. City of Moscow Gas Company* (1877) 7 Ch. D. 241, discussed.

Full Court.]

JOHNSON v. MILLER.

[Nov. 29, 1899.

Bennett-Atlin Commission Act, 1899—Appeal by consent from Commissioner purporting to sit as a County Court Judge—Whether competent.

Appeal to the Full Court from a decision of IRVING, J., pronounced at Atlin City in a dispute brought by petition before him as "Special Commissioner" under the Bennett-Atlin Commission Act, 1899, to assess the damages suffered from the destruction by the defendants of a natural dyke that protected the mining claims of the plaintiffs. At the trial both parties expressed a wish to have a right of appeal, and as the statute provided that the Commissioner's decision should be final, he decided to sit as a County Court Judge, and so give the parties an opportunity of appealing.

Held, that the Special Commissioner could not confer the right of appeal to the parties to a dispute tried before him by purporting to sit as a County Court Judge. No order made.

Wilson, Q.C., for appellants.

Irving, J.]

HAND v. WARREN.

[Dec. 16, 1899.

Mining law—Action to set aside certificate of improvements instead of adverse action.

Action by the recorded owner of two mineral claims to set aside the certificate of improvements issued to the defendants in respect of the same claims previously recorded by them under different names. On behalf of the plaintiff it was alleged that the certificate of improvements was obtained by fraud. The evidence shewed that the defendants had employed a man to do the assessment work, who fraudulently represented to the Mining Recorder that the necessary work had been done, and in this way obtained a certificate of work. The action was tried on 6th December, 1899, at Rossland before IRVING, J. The plaintiff failed to bring his adverse

action in time, but on the 5th of March, 1898, brought this action to set aside the certificate of improvements issued on the 10th of February, 1898, on the ground that the same was obtained by fraud.

Held, that an adverse claimant who neglects to take the remedy provided by s. 37 of the Mineral Act cannot sue to set aside a certificate of improvements on the ground of fraud. *Seemle*, that under such circumstances the Crown alone is entitled to sue.

Martin, Q.C., and *W. S. Deacon* for plaintiff. *J. A. Macdonald* for defendants.

Martin, J.]

[Dec. 19, 1899.

MCDONALD v. CANADIAN PACIFIC EXPLORATION CO.

*Inspection of Metalliferous Mines Act, R.S.B.C. (1897) c. 134, s. 25—
Accident by falling rock—Duty of mine owner under Act.*

Action tried at Nelson before MARTIN, J., without a jury, for damages received by a miner in a mine. On behalf of the plaintiff it was contended that the air course in which he was set to work was not securely timbered, in consequence of which alleged negligence a mass of rock fell from the hanging wall upon his left foot and severely crushed it, causing injuries which resulted in the amputation of the greater part of the wounded member. Sec. 25, rule (20) of the Inspection of Metalliferous Mines Act provides that "Each shaft, incline, stope, tunnel, level or drift, and any working place in the mine to which this Act applies, shall be, when necessary, kept securely timbered or protected to prevent injury to any person from falling material;" and the operative words of sec. 25 are: "The following general rules shall, so far as may be reasonably practicable, be observed in every mine to which this Act applies."

Held, that the accident was caused by plaintiff's own carelessness, and further, that sec. 25 of the Inspection of Metalliferous Mines Act was not intended to impose unreasonable burdens upon the mine owner, and therefore he is only required to use reasonable precaution against accidents to the miners. Action dismissed.

Macdonald, Q.C., and *Johnson* for plaintiff. *MacNeill*, Q.C., for defendant.

Martin, J.]

TRAVES v. CITY OF NELSON.

[Dec. 21, 1899.

Municipal law—Revising by-law—Printed roll not attested by mayor and city clerk at time of passage of by-law—Proceedings by municipality under a by-law not quashed—Municipal Clauses Act, R.S.B.C. (1897), c. 144, ss. 91, 92—Certiorari—Validity of by-law may be determined by.

Action for an injunction to prevent the defendant corporation from pulling down and removing a building within the fire limits as defined by by-law No. 7 of the revised by-laws of the City of Nelson, and for damages.

Held, Where a revising by-law purports to bring into effect a number of by-laws contained in a printed roll alleged to be attested by the mayor

and city clerk, but such roll was not, in fact, so attested until after the final passage of the revising by-law, such by-law has failed to bring into force any by-law contained in such roll.

Held, further, on a motion for a writ of certiorari to remove the conviction of the plaintiff by the Police Magistrate of the City of Nelson for an alleged infraction of the said by-law, that the validity of such a by-law may be determined in certiorari proceedings.

S. S. Taylor, Q.C., and *R. W. Hannington* for plaintiff. *Sir C. H. Tupper*, Q.C., and *Gallihier* for defendants.

England.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

MOLSONS BANK *v.* COOPER.

Collateral security—Crediting proceeds—Suspense account—Banks.

A bank gave a customer "a line of credit to \$150,000, to be secured by collections deposited":—

Held, that the bank was bound to credit the customer with the payments made from time to time to the bank on collateral notes deposited with the bank by the customer in accordance with the terms of the memorandum, and could not hold the payments in a suspense account until the maturity of the customer's own paper given to the bank to cover the line of credit, and take judgment against the customer for the full amount of that paper.

Judgment of the Supreme Court of Canada, 26 S.C.R. 611 affirmed, and see 32 C.L.J. 119.

Book Reviews.

An Analytical Synopsis of the Criminal Code and of The Canada Evidence Act, by James Crankshaw, B.C.L., Barrister, Montreal; author of An Annotated Edition of the Criminal Code, and of A Practical Guide to Police Magistrates, and Justices of the Peace, Montreal: C. Theoret, Law Book Publisher, Nos. 11 and 13 St. James Street.

The title page expresses sufficiently what the author claims to have done. It has been prepared at the request of the publisher for use by the students, as well as the magistrates and practitioners, as an auxiliary to larger works on the subject. It brings the amendments to the Code down to date.

A treatise on the Canadian Law of Conditional Sales of Chattels, and of Chattel Liens. By W. J. TREMEER, of the Toronto Bar. Toronto, 1899: The Canada Law Book Company, Law Publishers, 32 Toronto Street.

The wide spread use within recent years of contracts of conditional sale has given rise to many statutes and reported decisions dealing with that class of contracts, and this excellent treatise on the subject makes a timely appearance. The annotation of the statutory law on the subject is made with references to the statutes of the Provinces of Ontario, Nova Scotia, British Columbia, Manitoba, New Brunswick and Prince Edward Island and the North-West Territories. The statutes and decided cases of the various provinces are collected and discussed, while reference is made to the more important English and American decisions. Among the subjects treated of are Rights of Vendor and Vendee under contracts of Conditional Sale, Rights of Third Parties, Chattel Liens, Lien of unpaid Vendor, Stoppage in Transitu, Factors' Liens, Warehousemen's Liens, Carriers' Liens, Woodmen's Liens, Innkeepers' Liens, Landlord's Liens. Mortgagee's Liens by distress are also dealt with. An appendix contains the statutes of the several provinces. The index is unusually full and accurate. The printing and binding of the book are of the best style. The profession will find the book to be a practical and reliable reference work on this branch of the law.

The Statutes Serial with Decided Cases. Taxes and the Assessment Law, by H. E. F. Caston, Barrister. Toronto: Carswell Co., Law Publishers, 1899.

It is not easy to gather what is the object aimed at by the compiler. He gives copies of certain statutes and portions of statutes, some referring to the subject of assessment and taxes, and others which have no relation to such matters, and the reader is not assisted by a list of them.



PLATE 1

Canada Law Journal.

VOL. XXXVI.

FEBRUARY 1, 1900.

NO. 3.

HON. SIR CHARLES HIBBERT TUPPER, Q.C.

Few men have so early in life occupied the prominent position which has fallen to the lot of the gentleman whose portrait appears on the opposite page.

Sir Charles Hibbert Tupper, was born at Amherst, Nova Scotia, on August 3, 1855, being the second son of Hon. Sir Charles Tupper, so well known in Dominion politics. Mr. Tupper received his education at Windsor Academy in Nova Scotia, then at McGill University, Montreal, where he obtained the Governor-General's scholarship, and subsequently at Harvard University, graduating in 1876.

In the year 1878 he was called to the Bar of Nova Scotia, and to the Ontario Bar in 1895. After practicing his profession for some years in his native Province, in October, 1897, he removed to Vancouver, at once taking a prominent position at the Bar in the Province of British Columbia. Although his legal abilities were fully recognized in his own Province, it may perhaps be said that Sir Hibbert's career of success in his profession is but beginning, inasmuch as very early in life he was engaged in politics, not the best way it may truly be said of obtaining briefs. A strong conservative like his father, he was sent to the House of Commons as member of Pictou in 1882. In 1888 he was appointed Minister of Marine and Fisheries under Sir John A. Macdonald. In December, 1894, on the death of Sir John Thompson he became Minister of Justice and Attorney-General in the Bowell Administration.

The most important event of his political career was his appointment in June, 1892, as Agent for Great Britain in connection with the Behring Sea arbitration. The great ability and industry shown by him in the preparation of the case for the British Government received from them the very warmest acknowledgement, as appears in the message from the Secretary of State for the Colonies to the Governor-General of Canada, which read as follows: "Without waiting the official text of arbitration award I will not delay congratulations to Canada upon Tupper's



HON. SIR CHARLES HIBBERT TUPPER, K.C.M.G., Q.C., M.P.

Canada Law Journal.

1.

FEBRUARY 1, 1968

v. 3.

JOHN SIR CHARLES HIBBERT AMPTON, Q.C.

... the face so early in the development, in a prominent position
... the face to the left of the center of the head, appears
... the face.

John S. H. B. Fugger was born in Nova Scotia, Canada, in 1855 being the second son of Hon. Sir Charles Fugger, well known in Dominica as a police officer. Fugger received his education at Wesleyan Academy in Nova Scotia, then at McGill University, Montreal, where he obtained a bachelors degree and a scholarship, and subsequently at Harvard University, graduating in 1876.

In the year 1873 he was called to the Bar in New Brunswick and to the Ontario Bar in 1875. After practicing his profession for some years in his native Province, in October, 1876, he came to Vancouver, at once taking a prominent position in the legal profession of the Province of British Columbia. Although he has not yet been fully recognized in his own Province, it may be said that Sir Hubbert's career of success in his profession began as early in life as he was called to the Bar. In the first way it may truly be said of him that he was called to the Bar by his father, he was sent to the Bar by the Government of Victoria in 1882. In 1883 he was appointed to the position of Marine and Fisheries under Sir John Lubbock, and in 1884 he was appointed to the position of the death of Sir John Lubbock, and in 1885 he was appointed to the position of Justice and Attorney General of the Province of British Columbia.

The most important event of his political career was his appointment in June, 1892, as Agent for Great Britain in connection with the Bering Sea arbitration. The great success of his mission was due to him in the preparation of the case, and to the friendly relations which he received from them the very warmest thanks. The following appears in the message from the Secretary of State to the Governor-General of Canada, with reference to his mission: "Without waiting the official text of arbitration, I take the liberty to convey my warmest congratulations to Canada upon the successful result of the Bering Sea arbitration."

success as British Agent in asserting the freedom of the sea and in maintaining the legal rights of Canadian ships." For his services on this occasion he received the honour of knighthood.

From the ability and energy exhibited in his past career it may well be expected that there is a large field of usefulness and distinction yet in store for the subject of this sketch, and should his life be extended to the allotted span, there will doubtless be more to record of him hereafter. A warm friend, genial, outspoken and manly he is deservedly popular.

In 1897 he married Janet, daughter of the Hon. James Macdonald, Chief Justice of Nova Scotia.

The year 1899 has marked the loss of several eminent members of the Bench in England. Lord Justice Chitty died suddenly in February; Lord Herschell in March, when on duty as President of the Anglo-American Commission; Lord Watson, in the month of September and Lord Ludlow on Christmas Day. These were all distinguished men and eminent judges. In addition to the above, who were engaged more or less in judicial duties, the following eminent men who had retired from work have also passed away; Lord Esher, formerly Master of the Rolls, who died in May, and Lord Penzance, who was Dean of Arches until March last, who also passed away in December. Sir Arthur Charles succeeded Lord Penzance as Dean of Arches, and Mr. Bucknill fills the vacancy created in the Queen's Bench Division by the resignation of Mr. Justice Hawkins, the latter retiring under the title of Lord Brampton. In the present year Mr. Justice North, after a long and honorable judicial career, has retired, and Mr. Buckley, Q.C., the eminent authority on company law, has been elevated to the Bench in his place.

It may not be out of place to remind the profession that the legacy tax under the Ontario Succession Duty Act, R. S. O. 1897, c. 24, is to be deducted from the amount payable to the legatees in the proportions provided for by the Act, and that executors have no discretion to deduct the whole amount from residue and pay to legatees the amounts bequeathed free from duty. Should executors by accident or forgetfulness make payments of legacies in full, they would be charged with the amount of the duty in

passing their accounts before the Surrogate Judge: *Kennedy v. Protestant Orphans' Home*, 25 O.R. 235; and *Manning v. Robinson*, 29 O.R. 483.

Some time ago a discussion took place in the columns of the *Solicitors' Journal*, England, as to who was the longest practising solicitor, when after much research and some heart burnings the conclusion was arrived at that Mr. George Hensman, of Lincolns Inn field, was entitled to that honor. He is said to be in his ninetieth year; was admitted in Easter Term, 1835, and is still in practice. This is very good for England, but Mr. Hensman is but an infant as compared with Mr. B. D. Siliman who recently returned to the practice of his profession in New York. He is in his ninety-fifth year, and was admitted to the bar in 1829. We gather from the notice of his life in the *Albany Law Journal* that he was never known to lose his temper, avoided stimulants of all kinds, was remarkable for his regular habits, and never married. To which of these incidents or whether to any of them his vigorous old age is to be attributed we know not. It may truly be said that in his case at least the old adage "Go it while you're young" has no application. Let the white haired man of this generation take comfort hereby.

We reproduce as worthy of preservation, as well for those of us who know their present applicability as for all who shall in future years hail from the loyal precincts of Osgoode Hall, the eloquent words with which Mr. Justice Rose closed his lecture on legal ethics to the third year students of the Law School on the 19th inst. After enlarging upon a lawyer's duties to his client, to the court, to himself and to his country he quoted the language of the oath of allegiance, and thus spoke of recent stirring events in reference to Canada's connection with the wars of the empire: "It was only yesterday that from our ranks went forth noble and brave young men, with quick step, bounding pulse, and hearts filled with love for the empire, placing at her command not only fullness of service, but also the life-blood of their hearts, whose every throb is a prayer for Queen and country. If they shall fall on the field of battle, they shall not die but live—live in our hearts, live in memory, in the pages of history, in deeds which cannot die. We are proud of those who have gone, and as to those who remain, I know there

is but one heart, one mind, one love, and if—which may God forbid—the tide of war shall roll to our shores, it will be met by a solid wall of loyal hearts bound together by a strong tie of devotion to a united empire, a wall against which the waves may dash, but shall dash in vain, and, broken, shall be thrown back into the sea to die with the sullen roar of final defeat, for ‘God will save our Queen.’”

LEGAL EDUCATION.

We are glad to see that the voice of the profession in Ontario, which found its expression on several occasions in these columns as to the defects in our system of legal education, has resulted in a change which is in the direction we indicated as desirable. There is, however, much ground still to be occupied, but now that the defects are recognized, there is hope that more may eventually be accomplished. The change referred to is not in itself very important, but is good so far as it goes. It is to give lectures on elementary points of practice to first-year students, instead of waiting to take up matters of practice during the second and third years. Of course, no amount of lectures on practice can take the place of work in an office, but they are better than nothing.

The subject opens up a wide field for discussion, and various questions present themselves for consideration. Amongst others, it may be asked: Whether it would not be well to require at least one year in an office in addition to three years of academic study? Whether university graduates should or should not have the privilege of only three years' study, whilst others must have five—whether, in fact, the college training of the former is as useful or beneficial as the two years' extra experience of the latter, especially when too often the former amounts to little more than a capacity to “cram” for an examination? Whether it is well to attempt, as at present, to combine office work with Law School studies, and so spoil both? Whether any better system than the present can be devised, either by a reconstruction of the Law School, or how otherwise? The subject is of interest not to Ontario alone, but to all the provinces whose system of jurisprudence is based upon the common law.

QUO WARRANTO.

The earliest form of quo warranto proceedings was by a prerogative writ in the nature of a writ of right by the King against one who had usurped or claimed any office, franchise or liberty of the Crown, enquiring by what authority he supported his claim ; and the writ was issued out of Chancery.

The first proceeding of which we have record was in A.D., 1198, during the reign of Richard I., and was against the incumbent of a Church, calling upon him to shew " Quo Warranto " he held the church. It was frequently employed during the Feudal period to strengthen the power of the King against the Barons.

The encroachments of the Crown caused statutes to be passed in the reign of Edward I., curtailing its authority under the writ. Shortly after this time, the form of an information was substituted; and in lieu of the original writ, Charles II. and James II. used the information for the purpose of forfeiting the charters of large numbers of municipal corporations throughout the Kingdom ; and these actions brought about the passing the statutes in the reigns of William III. and Anne, restricting the power of the Crown very considerably.

Whether the original writ or its successor has or has not any legal existence in Ontario at the present day it is not the purpose of this article to inquire. For practical purposes the only proceeding now in use in Ontario bearing the title of quo warranto is that authorized and provided by the Municipal Act R.S.O. c. 233, s. 219, et seq., for the purpose of inquiring and declaring whether persons assuming to act as municipal officers have been duly elected to the office which they assume to hold.

The proceedings may be taken in Chambers either before the Master in Chambers, or before a Judge of the High Court, or before the Judge of the County Court of the County in which the election took place.

Who may be a relator.—Any candidate at the election or any voter who gave or tendered his vote at that election, or, in the case of an election by acclamation, any person entitled to vote may institute the proceedings and is known as a relator. The style of cause being " The Queen upon the relation of *John Doe v. Richard Roe.*"

Proceedings and time for instituting.—Proceedings must be instituted within six weeks after the election, or four weeks after the

acceptance of office by the defendant. The first proceeding is an *ex parte* application for a fiat authorizing the relator to serve a notice of motion by way of *quo warranto*. The application is founded on an affidavit shewing that there is reasonable ground for supposing the election was not legal, or for contesting the election. Before obtaining this fiat the relator must give and file a recognizance in the sum of \$200, and sureties of \$100 each, that he will pay any costs which may be adjudged against him. This recognizance may be allowed by the Judge on affidavits of justification and such allowance is endorsed by him on the recognizance. Where a recognizance has thus been allowed the sufficiency of the sureties cannot subsequently on appeal or otherwise be inquired into: *Reg. ex rel. Mangan v. Fleming*, 14 P.R. 458.

A summons issued within a month after the formal acceptance of office, although more than six weeks after the election is in time: *Reg. ex rel. Felitz v. Howland*, 11 P.R. 264. At least seven clear days' notice of the motion must be given, and it must contain the name of the relator, his occupation, address, and whether he is a candidate or voter; if the notice of motion does not shew the interest of the relator, but this is set out in the affidavit filed in support of the motion, an amendment would, if necessary, be granted: *Reg. ex rel. Percy v. Worth*, 23 O.R. 699. The notice must state specifically the grounds of objection to the validity of the election, and also those in favour of the validity of the election of the claimant if there be a claimant. On the hearing the relator will be confined to these grounds, and if the grounds of objection apply equally to two or more persons they may all be proceeded against in one motion, but a person cannot take proceedings as a relator against the election of a person he has himself voted for unless he shews he was ignorant of the objection: *Reg. ex rel. Coleman v. Hare*, 2 P.R. 18.

Affidavits may be filed in support of the motion, or *viva voce* evidence may be taken, and the names of the witnesses must be set out in the notice of motion which must be served personally within two weeks from the date on which the fiat is granted, but substitutional service may be ordered by the Judge if he deem it proper. If, however, the question of bribery or undue influence is raised, the evidence in support of that charge must be given *viva voce* and not by affidavit. The affidavits should be filed before the notice, if served otherwise they cannot be read in support of

the motion, but the failure to file the material does not vitiate the motion: *Reg. ex rel. Mangan v. Fleming*, 14 P.R. 458.

On the hearing the Judge may require the clerk of the municipality to produce any assessment rolls or other document in his possession, and shall try and determine the validity of the election complained of, and of the alleged election of the claimant of the seat if there is one, and when more motions than one are made against an election, all shall be returnable before the Judge who tries the first one, and he may give a separate judgment in each case or give one judgment for all.

Concurrent proceedings. — If concurrent proceedings are launched in the High Court and in the County Court against the same person, the Judge of the High Court sitting in Chambers cannot prohibit the County Court Judge from proceeding with the trial. In such case the proper procedure is for the defendant to make a motion in that Court in which the last proceeding was launched calling upon both relators to shew cause why the quo warranto proceedings last brought should not be set aside or made returnable before the Court having cognizance of the earlier proceedings: *In re Reg. ex rel. Hall v. Gowinlock*, 29 O.R. 435.

Where the trial is before the High Court Judge he may order evidence to be taken viva voce by the County Court Judge, and he may at any stage of the proceedings order any person to be made a party, or may allow any eligible person to intervene and become relator, but when the relator in a quo warranto proceeding desires to withdraw, the Court has no power under the statute or otherwise to compel him to go on against his will or to substitute a new relator: the power given by 55 Vict., c. 42, s. 196, now R.S.O. c. 223, s. 231, is to substitute a new defendant, not a relator: *The Queen ex rel. Masson v. Butler*, 17 P.R. 382.

Disclaimer and its effect.—Any person elected may, after the election and before it is complained of, deliver a disclaimer, signed by him, to the clerk of the municipality in the following form: "I, A. B., do hereby disclaim all right to the office of ——— in the ———, and all defence of any right I may have to same," or, if the election is being proceeded against, may (unless the proceedings are on the ground of corrupt practice by him), within one week after the service of the notice of motion on him, forward a disclaimer, signed by him, to the Judge before whom the proceedings are being taken, and also to the relator or his solicitor; the disclaimer must be in

the form prescribed by R.S.O. c. 223, s. 238, otherwise it will not be a protection: *Reg. ex rel. Mitchell v. Davidson*, 8 P.R. 834, and this will relieve the person from liability for costs, and will operate as a resignation by him, and the person having the next highest number of votes is thereby elected. The provisions relating to disclaimer have proved to be of great practical utility, and persons whose election is complained of very frequently take advantage of them.

At an election there were three candidates, and the two who received the highest number of votes successively disclaimed; thereupon the remaining candidate made a declaration of office and took his seat, and it was held that what took place constituted the election of respondent and entitled him to seat: *Reg. ex rel. Percy v. Worth*, 23 O.R. 688.

A ground of complaint very frequently raised is that the person elected has not the necessary property qualification prescribed by the Municipal Act. In considering the property qualifications of a candidate, the rating in the last revised assessment roll is final and conclusive: *The Queen ex rel. Hudgin v. Rose*, 33 C.L.J. 398, and occupation of partnership property was held to be "actual occupation" by each of the partners in *The Queen ex rel. Joannis v. Mason*, 28 O.R. 495, and voters' lists are final as to the qualification to vote at a municipal election in Ontario: *The Queen ex rel. McKenzie v. Martin*, 28 O.R. 523.

A frequent ground of objection is that the defendant was disqualified by having some contract with the municipality. In *Reg. ex rel. McGuire v. Birkett*, 21 O.R. 162, the election of a person who had a contract with the corporation of which he was elected an officer was held invalid. A municipal election was set aside, but without costs to the relator, on the ground that he was auditor of the corporation: *Reg. ex rel. Brine v. Booth*, 9 P.R. 452.

Besides lack of personal or property qualification the election of a person may be attacked on account of bribery. Bribery is defined to be giving, lending, or agreeing to give or lend any valuable consideration to any person, or procuring or promising to procure any office for any person on account of his having voted or refrained from voting, but municipal elections are not avoided for bribery of agents without authority where the candidate has a majority of votes cast (*Reg. ex rel. Thornton v. Dewar*, 26 O.R. 512), or the complaint may be of having exercised undue influence,

which means any restraint whatsoever placed on a person which interferes with the free exercise of the franchise.

A person found guilty of either of the above forfeits his seat and is disqualified for two years, and any person found guilty of bribery is liable to a penalty of \$20, and is disqualified from voting for two years ; and this penalty may be recovered in the Division Court, and the person against whom judgment is given is disqualified until it is paid.

The issue is tried in a summary manner without formal pleadings, and if the election is invalid the judgment removes the person from office. If some other person is found duly elected the judgment orders that such person be admitted to the office, and if that person was not duly elected it orders a new election. The order for a new election is directed to the sheriff of the county in which the election was held. The order also provides for costs and may be enforced in the same way as an order for mandamus and by writ of execution. If the election has been declared invalid on account of improper conduct of the returning officer or deputy returning officer the judge may order him to pay the costs of the proceedings. As to penalties imposed on such officers see *Wilson v. Manes*, 28 O.R. 419. The duties of such officers are ministerial not judicial ; and no proof of malice or negligence is required in an action for such penalties.

A deputy returning officer was absent from the polling booth on three occasions. There was no suggestion of bad faith, and it being proved that the absence and what was done during his absence did not affect the result of the election it was declared that the election was valid : *The Queen ex rel. Watterworth v. Buchanan*, 28 O.R. 352.

An appeal may be taken from the decision of the Master in Chambers or of the County Court Judge to a Judge of the High Court and the procedure is the same as on an appeal from the Master in Chambers. The decision of a Judge of the High Court whether on such appeal or in the first instance is not further appealable.

Precedents affording suggestions as to the various forms connected with these proceedings may be found in Bell and Dunn's Forms and Precedents of Practice at pages 45, 80, 172, 335, 524 and 590.

JAMES H. SPENCE.

Toronto.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH
DECISIONS.

(Registered in accordance with the Copyright Act.)

**POWER—EXECUTION OF POWER—LIMITED POWER — EXERCISE OF POWER BY
WILL—INTENTION.**

In re Sharland (1899) 2 Ch. 536, a summary application was made to the court for the purpose of determining whether there had been a valid execution of a limited power. The donee, in addition to a limited power to appoint the income of certain property to her husband for life, had also two general powers of appointment; by her will, which contained no reference to the limited power or to the property subject thereto, she gave, devised and bequeathed all her real and personal estate, and appointed all real and personal estate over which she might have a power of appointment unto her husband absolutely. It was contended on behalf of those entitled in default of appointment under the limited power, that that power had not been validly exercised because the general words would not include the limited power unless the testatrix had no other, here the existence of the other two general powers, prevented the general words from applying to the limited power in the absence of any express intention of the testatrix to exercise it. Kekewich, J. however held that the limited power had been validly executed as the will sufficiently shewed that the testatrix intended to exercise all powers which she had.

**VENDOR AND PURCHASER.—CONDITION AGAINST ALIENATION—REVERTER—
REFUSAL TO FORCE TITLE ON UNWILLING PURCHASER.**

Re Hollis Hospital, Hagues' Contract (1899) 2 Ch. 540, was an application under the Vendors and Purchasers' Act, in which the point submitted to Byrne, J., was as to the effect of a condition of reverter contained in a deed made in 1726, whereby certain property was conveyed to trustees for the use of a charity, subject to the provision that if any part of the property conveyed should be employed or converted to any other use or purpose than that of the charity, the property should revert to the original donor. The trustees of the charity had entered into a contract for sale of part of the property so conveyed, and the heir of the original donor had notified the purchaser that he would, in the event of the sale being carried out, claim the property by virtue of the proviso. Byrne, J.,

was of opinion that the condition or proviso for reverter offended against the law against perpetuities, and was null and void, but in view of the notice served by the heir of the original donor, who refused to become party to, or bound by, the present proceedings, he held that the title was not one which could be forced upon the purchaser if unwilling to complete.

APPROPRIATION OF PAYMENTS—BANKING ACCOUNT—FOLLOWING FUND—APPLICATION OF RULE IN CLAYTON'S CASE.

Mutton v. Peat (1899) 2 Ch. 557, is a case in which the application of the rule in Clayton's case came in question. The facts were, that certain brokers had an account current and a loan account with their bankers. On 11 Jan, 1896, the brokers paid into their current account £790 4s. 6d., received from one Parker for investment, a few days after the brokers were adjudicated bankrupt. On 20th January, 1896, the bankers closed the current account and transferred the balance standing to the credit of that account to an account in their books called the "liquidation account." At this time there was owing by the brokers on the loan account £7,500, for which the bankers held securities, which they proceeded to realize, and from time to time as the securities were realized they gave credit in the "liquidation account," debiting a proportionate part of the loan account charging interest thereon up to the date of such credit. The securities realized sufficient to pay off the whole debt of £7,500 and left a balance over, and Parker now claimed that the £790 4s. 6d. should be paid to him out of the balance in the bankers' hands. Byrne, J., held that under the circumstances he was entitled to it, as owing to the way the bankers had kept the account it was clear that they had not appropriated as they might have done the balance standing to the credit of the current account towards the payment of the debt owing by the brokers on the loan account. The rule in Clayton's case, therefore, did not apply, and as between third persons interested in the securities which had been realized, and Parker, the latter, was held to have the better equity.

HUSBAND AND WIFE—SEPARATE ESTATE—LOAN BY WIFE TO HUSBAND—BOND BY HUSBAND—INTEREST ON BOND—DAMAGES—STATUTE OF LIMITATIONS (21 JAC. 1, C. 16)

In re Dixon, Heynes v. Dixon (1899) 2 Ch. 561, was an action for the administration of the estate of Thos. Dixon in which the

plaintiffs as trustees of his marriage settlement claimed to be creditors of his estate under the following circumstances. By the marriage settlement made in 1847 certain real estate was vested in trustees upon trust for the wife for life with remainder to the husband for life, with remainders over. The settlement contained power to sell and invest proceeds with the consent of the husband or wife on real or personal security. The estate was sold in 1852 and the trustees at the request of the wife advanced the proceeds of the sale to the husband on the security of his bond in a penal sum equal to double the amount advanced conditioned for re-payment of the sum advanced six months after date with interest at four per cent. The husband and wife lived together in amity until the wife's death in 1876, and the husband died in 1896. No interest was ever paid on the bond or any acknowledgment given by the husband. The plaintiffs claimed to be entitled to recover from the husband's estate the principal money secured by the bond with interest thereon from the date of his death. The bond was found among the husband's papers. The husband's executors contended that the claim was barred by the Statute of Limitations, and that at any rate, interest could only be recovered as damages. Byrne, J., came to the conclusion that as the hand to pay and receive the interest was, until the death of the husband, the same, no payment was necessary, and that therefore the Statute of Limitations did not apply. He also held that where a bond, as in this case, is subject to a defeasance to make the same void on payment of a lesser sum and interest, the interest is payable as interest and not as damages, and that the amount of interest recoverable on such a bond is not diminished by reason of the bond being conditioned for payment of interest up to or at a certain date.

MARRIAGE SETTLEMENT—AGREEMENT FOR SETTLEMENT BY INFANT—REPUDIATION — RATIFICATION — COVENANT TO SETTLE WIFE'S AFTER ACQUIRED PROPERTY.

Viditz v. O'Hagan (1899) 2 Ch. 569, turns upon the validity of marriage articles made by a lady on marriage before attaining her majority. The marriage took place in 1864 in Bern, the husband being an Austrian. The marriage articles were executed at the British Embassy at Bern, and therein the husband covenanted to settle the wife's after acquired property (except pecuniary legacies)

upon the usual trusts for the wife for life, with a restraint on alienation and for the children of the marriage. In 1867 the wife attained 21. In 1870 she became entitled on the death of her mother to £6,000, which was paid over to the trustees of the marriage articles. In 1880 a deed in English form was executed in Paris which purported to be a settlement in pursuance of the articles of 1864, but contained a covenant to settle all after acquired property of the wife, not excepting pecuniary legacies. In 1882 the wife became entitled to a further sum of £2,000, and by virtue of a compromise of a suit to a further sum of £13,000 to be settled on her and her children, and £5,000 to be paid to her personally. In 1892 the wife became entitled to a legacy of £2,000, and in November of that year she was informed that this sum and also the £5,000 would have to be paid over to the trustees of the marriage settlement. She then took advice, and, in November, 1893, she and her husband executed in Austria in accordance with Austrian law a notarial act, by which they purported to revoke and annul the deeds of 1864 and 1880, and to vest in the wife the unrestricted administration of all her property. The present action was instituted by the husband and wife and the children of the marriage who had all attained 21, praying a declaration that the settlements of 1864 and 1880 had been validly annulled, and alternatively that the settlement of 1880 was void or that the wife was entitled to repudiate it so far as the £5,000 and the £2,000 legacies were concerned. Cosens-Hardy, J., who tried the action, held that under *Edwards v. Carter* (1893) A.C. 360 (noted ante vol. 29, p. 735) the marriage articles, though made during the infancy of the wife, were not void but voidable only on her repudiating them within a reasonable time after coming of age, and that the lady had not repudiated them, but on the contrary had ratified them after coming of age, and that the settlement must be governed by English law and the attempted annulment thereof in 1893 was inoperative and that the £5,000 was bound by the settlement, but he held that the settlement of 1880 had gone beyond the original articles in so far as it extended the covenant to settle after acquired property to legacies. That deed being binding only so far as it carried out the articles, and being inoperative as to future estate, and to that extent he ordered the settlement of 1880 to be rectified so as to conform to the articles of 1864.

UNDUE INFLUENCE—HUSBAND AND WIFE—SOLICITOR AND CLIENT—BENEFIT TO RELATIVE OF SOLICITOR.

Barron v. Willis (1899) 2 Ch. 578, was an action brought by the plaintiff for the purpose of obtaining a declaration that certain deeds varying a post nuptial settlement of the plaintiff's deceased husband's property, were invalid on the grounds that they had been prepared by the solicitor of the husband, and the deeds had the effect of accelerating a benefit which the solicitor's son was entitled to under the settlement. Cosens-Hardy, J., was of opinion that there had in fact been no undue influence exercised by the solicitor, and that the deeds in question had been duly explained to the plaintiff and their effect understood by her, and the mere fact that the husband's solicitor had prepared the deeds without the plaintiff having independent advice did not render the deeds invalid, nor yet the fact that the solicitor's son was benefited thereby. Notwithstanding what may be said by text writers to the contrary, the learned judge holds that the authorities have established that the relation of husband and wife is not one of those to which the doctrine of *Huguenin v. Baseley*, 14 Ves. 273, applies, and in other words, that there is no presumption that a voluntary deed executed by a wife in favor of her husband and prepared by the husband's solicitor is invalid, and that the onus probandi lies on the party who impeaches such a deed, and not on the party who supports it.

TRUSTEES—SEVERING IN DEFENCE—COSTS.

In re Maddock, Butt v. Wright (1899) 2 Ch. 588, one of the several defendants, who were trustees, under circumstances which the court considered proper, appeared on a motion by separate counsel, and the costs of such separate appearance were allowed to such defendant. On taxation of the costs the taxing officer allowed the plaintiff the costs of two counsel, but refused to allow but one counsel to the defendant although he had in fact been represented by two. On appeal from the taxing officer, Cosens-Hardy, J., held that the defendant was entitled to tax two counsel fees.

COMPANY—WINDING UP—CONTRIBUTORY—COMPANY LIMITED BY GUARANTEE—CALLS.

In re Bangor & North Wales M. M. P. Ass'n. (1899) 2 Ch. 593. This was a winding-up proceeding in respect of a mutual insurance company which had no paid-up capital but was limited by

guarantee, the guarantors undertaking, in the event of a winding-up, to contribute in certain proportions to the assets of the company. One of the guarantors was also liable in respect of certain subscriptions for insurance, and calls for losses, and the simple question presented to Wright, J., was whether he was liable as a contributory in respect of such subscriptions and calls as well as for the amount guaranteed, which question the learned judge answers in the negative, considering that the liability for subscriptions and calls is one that must be enforced by suit as in the case of any other debt due to the company.

LEASE—COVENANT—CONSTRUCTION—DISCONTINUANCE OF LICENSE.

In *Bryant v. Hancock* (1899) A.C. 442, the House of Lords (Lords Macnaghten, Morris and Shand) affirmed the judgement of the Court of Appeal (1898) 1 Q.B. 716 (noted ante vol. 34, p. 407.) The point at issue being the construction of a covenant in a lease whereby the covenantors bound themselves and their assigns that they would keep the demised premises (a public house) open every lawful day, and conduct the business in a proper and orderly manner so as to afford no ground or pretence for discontinuing the license thereof. The breach alleged by the plaintiff was that the covenantors under-lessee had been guilty of a breach of the license law, in consequence of which the magistrates refused to renew the license. Lord Shand, though agreeing with the affirmance of the judgment of the Court of Appeal dismissing the action, expressed grave doubts whether the opposite view was not the correct one.

CONTRACT—AGREEMENT FOR SHARE OF PROFITS—AUDIT—FINALITY OF AUDIT—UNFOUNDED CHARGES OF FRAUD—COSTS.

Teacher v. Calder (1899) A.C. 451, was an appeal from the Court of Session, Scotland. The appellant had advanced a sum of money to the respondent to be used in his business on the terms of being paid interest and 37½ per cent. of the profits of the respondent's business; and the contract stipulated that there should be an annual audit of the profits by a firm of accountants, and that their certificate as to the profits should be binding on the parties. One of the firm of accountants accordingly for four years audited the respondent's books, but he did so in ignorance of the agreement between the parties and also of the fact that his certificate was to be final and conclusive, and he swore that if he had

known this he would have made the audit on a somewhat different plan, by debiting to capital account some items which had been charged to revenue. The action was brought to have the accounts re-taken, and was dismissed by the Court of Session. The House of Lords (Lords Watson, Shand and Davey), however, reversed that decision, and granted the plaintiff the relief he claimed, holding that the contract was a quasi agreement to refer to arbitration, and that although the parties might have agreed to be bound by the award of a referee who was ignorant of the agreement between the parties and of the fact that his decision was to be final, yet they had not done so in this case, and that, under these circumstances, the audit having been made in ignorance of the rights of the parties, and of the fact that the audit was to be conclusive between them, it was not such an audit as the agreement contemplated, and was not binding, and the plaintiff was held entitled to have the accounts re-taken. Their Lordships, however, refused to give the successful appellant costs of the court below, because of the unfounded charges of fraud made in their pleadings.

MARKET—BY-LAW, VALIDITY OF.

In *Scott v. Lord Provost of Glasgow* (1899) A.C. 470, the validity of a market by-law was in question. The by-law was made in pursuance of a statute empowering the municipal authority to make by-laws (inter alia) "For regulating the use of the market place, and fair, and the buildings, stalls, pens and standings therein; and for preventing nuisances or obstructions therein, or in the immediate approaches thereto." The by-law in question provided in effect that sale rings in the market should not "be used for private sales, or for sales to any limited number of persons, or for sales from which any particular class of the public are excluded from bidding or buying." The House of Lords (Lord Halsbury, L.C., and Lords Watson, Shand and Davey) affirmed the decision of the Court of Session in favour of the validity of the by-law.

LEGACY—VESTING—POSTPONED PERIOD OF DISTRIBUTION.

Bowman v. Bowman (1899) A.C. 519, although a Scotch case, deals with a point of law in which the law of England and Scotland are alike. The case turns upon the construction of a will whereby the testator directed his trustees to allow his wife a life-rent use of his house and such allowance as they thought necessary, and "on

the dissolution and winding-up of the firm of B. & C. (of which he was a partner) in the event of the pre-decease of my said wife, and if she then survives, on her death, to realize my whole means and estate and to divide the same into four equal shares, and pay one share to each of my children (naming them) or to their respective heirs." The widow survived the testator and the firm had not been wound up, two of the children had survived the testator but were now dead. The action was instituted by the representatives of one of the deceased children against the testator's trustees praying a declaration that the shares of residue vested in the four children at the death of the testator. The Court of Session so decided, and the House of Lords (Lord Halsbury, L.C., and Lords Watson, Davey and Shand) affirmed the judgment of the court below.

STATUTORY POWERS — DAMAGES OCCASIONED BY EXERCISE OF STATUTORY POWERS—INJUNCTION—DAMAGES—IRRIGATION—LAND SLIDE.

Canadian Pacific Railway Co. v. Parke (1899) A.C. 535, was an appeal from the Supreme Court of British Columbia, in which the point involved was whether the defendants, who had in the exercise of certain statutory powers authorizing them to construct irrigation works, by diverting water on to their lands from adjacent streams, were responsible in damages to the plaintiffs for damages occasioned to their railway by reason of a land-slide occasioned by such irrigation work of the defendants. The defendants contended that the statutory authority under which their works were constructed relieved them from liability for the damages in question. The Judicial Committee of the Privy Council (the Lord Chancellor Halsbury, and Lords Watson, Hobhouse, Macnaghten, Morris, Shand and Davey,) reversed the judgment appealed from, on the ground that the statutory authority under which the plaintiffs acted did not authorize them to injure the plaintiff's land: they agreed with the court below that the critical question was whether the act was, as between the persons using the powers thereby conferred and the owners of adjacent lands, imperative or merely permissive, and they agreed with the court below also in holding that the right was merely permissive, but they dissented from the conclusion which the court below arrived at that the permission to use the water would be a bar to an action for damages where the use had been non-negligent. On the contrary, the Judicial Committee determined that where the Legislature has authorized a proprietor

to make a particular use of his land, and the authority is in the strict sense permissive only and not imperative, the Legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common law right of others.

CONTEMPT OF COURT—INNOCENT LOAN OF PAPER CONTAINING SCANDALOUS MATTER RESPECTING A COURT—JUDGE ORDERED TO PAY COSTS—COSTS.

In *McLeod v. St. Aubyn* (1899) A.C. 549, the appellant was a barrister-at-law, who had been committed to prison for fourteen days for an alleged contempt of court by the respondent as acting Chief Justice of the Supreme Court of St. Vincent. The alleged contempt consisted in the fact of the appellant having innocently lent to a third person a copy of a newspaper of which the appellant was the agent and correspondent. The paper in question contained, unknown to the appellant, libellous matter affecting the acting Chief Justice, the respondent, who made an order calling on the appellant to shew cause why he should not be committed for contempt, and subsequently, after hearing the appellant, committed him to prison for 14 days. The Judicial Committee (Lords Watson, Macnaghten, Morris and Davey) were of opinion that the facts did not warrant the finding of the Judge that the appellant had been guilty of contempt of court, and rescinded the order and ordered the respondent to pay the costs of the appeal. Some of the observations of the Committee may be useful to note: At p. 561, it is said, "The power summarily to commit for contempt of court is considered necessary for the proper administration of justice. It is not to be used for the vindication of a Judge as a person. He must resort to action for libel or criminal information. Committal for contempt of court is a weapon to be used sparingly, and always with reference to the interests of the administration of justice. Hence when a trial has taken place and the case is over, the judge or the jury are given over to criticism. . . . Commitments for contempt of court by scandalising the court itself have become obsolete in this country."

PROBATE—LEGATEE PREPARING WILL IN HIS OWN FAVOUR—FINDINGS OF JURY—NEW TRIAL.

Farrelly v. Corrigan (1899) A.C. 563, was an appeal from the Supreme Court of Queensland. The action was a probate action in which the court had precluded from probate a pecuniary legacy

exhausting nearly the whole of the testator's estate to his confidential agent who had drawn the will. The jury, as the court held, had properly found that the testator knew and approved of the contents of the will, except as regards the above mentioned bequest, which they found he did not know or approve of, but they had added a rider in which they expressed the belief that the testator intended to give to said legatee half his property. The appellant had applied in the court below for a new trial on the ground that the verdict was against the weight of evidence, and that the rider was inconsistent with the rest of the verdict. The court below thought that the rider was irrelevant and immaterial, but that if it was to be treated as a finding of fact it rather increased than diminished the suspicion attaching to the transaction, inasmuch as it shewed that the will did not truly express the testator's intention, and they refused the application, and with this conclusion the Judicial Committee, (Lords Watson, Macnaghten, Morris and Davey) agreed.

B.N.A. ACT—S. 91, S-S. 25 AND S. 92, S.-SS. 10, 13—B.C. COAL MINES REGULATION ACT 1890, S. 4—CHINAMEN—ALIENS.

In *Union Colliery Co. v. Bryden* (1899) A.C. 580, the Attorney-General of British Columbia intervened, in order to uphold the validity of an Act of the Provincial Legislature forbidding the employment of Chinamen in any coal mine within the Province. The Supreme Court of British Columbia had upheld the validity of the Act as being within the power of the Provincial Legislature but on appeal to the Judicial Committee of the Privy Council (Lords Watson, Hobhouse, Macnaghten, Sir Richard Couch and Sir Edward Fry) they reversed the decision, holding that although regarded merely as a coal working regulation the Act in question would be within the competence of the Provincial Legislature; yet from the fact of its exclusive application to Chinamen who are aliens or naturalized subjects, it instituted a statutory prohibition affecting that particular class, which was a matter within the exclusive jurisdiction of the Dominion Parliament conferred by the B.N.A. Act, s. 91, s-s. 25, in regard to "naturalization and aliens," and that therefore the Act in question was ultra vires and invalid.

GAS COMPANY—RIGHT TO STOP GAS SUPPLY.

In *Montreal Gas Co. v. Cadieux* (1899) A.C. 589, the Judicial

Committee (Lords Watson, Hobhouse, Macnaghten, Sir Edward Fry and Sir Henry Strong) on appeal from the Supreme Court of Canada, have held that, under a Canadian statute relating to gas companies which provided that "If any person . . . supplied with gas by the company shall neglect to pay any rate rent or charge due to the . . . company, at any of the times fixed for the payment thereof it shall be lawful for the company . . . on giving twenty-four hours previous notice to stop the gas from entering the premises, service pipes or lamps of any such person . . . by cutting off the said service pipe or pipes or by such other means as the company shall think fit," it is competent for a company to refuse to supply a person with gas at any of his houses on his neglect to pay his bill for gas supplied to any one of them. The case presents a curious variety of judicial opinion; the action was brought to compel the gas company to supply gas. The Supreme Court of Quebec in which the action was commenced decided in the plaintiff's favour; the Court of Queen's Bench of Quebec unanimously reversed the judgment and the Supreme Court of Canada (Gwynne, Sedgwick, King, and Girouard, JJ., Taschereau, J., dissenting) reversed the judgment of the Queen's Bench and their decision is now reversed by the Judicial Committee.

LATERAL SUPPORT — ADJACENT LANDS — ESCAPE OF PITCH — INJUNCTION — DAMAGES.

The Trinidad Asphalt Co. v. Ambard (1899) A.C. 594, is a case to which we recently referred in connection with the case of *Forde-son v. Sutton S. & D. Gas Co.*, noted ante vol. 35, p. 108. The appeal was had from the Supreme Court of Trinidad and Tobago, and the question at issue was whether the plaintiffs were entitled to an injunction against the defendant and damages under the following circumstances. The plaintiffs and defendants were owners of adjacent lands in which there were deposits of pitch and the defendants had in the course of working the deposits on their own land caused a subsidence of the plaintiff company's land and the pitch on their land to flow on to the defendants' land. The court below held that the plaintiffs had no property in the pitch which had flowed from the plaintiff's land on to the defendants', but differed as to whether the plaintiff was entitled to damages for loss of lateral support. The Judicial Committee held that pitch is not

like subterranean water the abstraction of which, by pumping or otherwise, causing subsidence gives no right of action, but that it is a mineral the withdrawal of which by the defendants, the plaintiffs were entitled restrain by injunction.

TRADE NAME—COLOURABLE IMITATION OF NAME—INJUNCTION.

Montreal Lithographic Co. v. Sabiston (1899) A.C. 610, was an action brought by the plaintiffs who had purchased the assets and goodwill of the dissolved Sabiston Lithographic and Publishing Co. of which one Alexander Sabiston had been the managing director, to restrain the defendant, who was a brother of Alexander Sabiston, from carrying on business under the name of the Sabiston Lithographing and Publishing Co. The appeal was from the Court of Queen's Bench of Quebec refusing the injunction. The Judicial Committee (Lord Halsbury, L.C., and Lords Watson, Macnaghten, Morris and Davey) agreed with the court below in the result, but did not adopt all the reasons of the court below. That court was of opinion that the liquidator of the dissolved company had no power to sell or transfer to the plaintiff company a right to use the name of the dissolved company, which was a grant from the crown, and the sale of the goodwill even though judicially authorized, was inoperative to transfer such right. The Judicial Committee dissented from this, and was of opinion that it was competent for the liquidator to sell the goodwill, but that the extent of the rights thereby transferred would depend on circumstances; and though the appellant could not acquire any corporate name except by grant from the Crown, the promoters of the appellant company might have applied for incorporation in the same name as the old company; but no such application having been made, and the plaintiff company having been incorporated under an entirely different name, and the defendant having carried on his business under its present name for some months prior to the sale to the appellants, and it not appearing that he had represented himself as the successor of the dissolved company, the committee were of opinion that the plaintiffs were not entitled to restrain the use of the name of the old company by the defendant.

**MUNICIPAL CORPORATION—ADOPTION OF BRIDGE BY CORPORATION—BY-LAW
—ACCIDENT TO BRIDGE UNDER CORPORATE CONTROL.**

In *Victoria v. Patterson* (1899) A.C. 615, the principal question was whether a by-law by a municipal corporation adopting a bridge is necessary in order to render a municipal corporation liable for damages for negligence in the care of such bridge. By an Act of British Columbia, municipal corporations are empowered to assume the control over bridges within their territorial limits. The Act does not expressly provide that a by-law must be passed for that purpose, and the evidence in the case established that the defendant corporation had in fact assumed the control over the bridge in question, and that the accident had been occasioned thereto by one of their officers having bored holes in one of the beams of the bridge, whereby the beams rotted and broke causing the accident in respect of which the plaintiff sued. The Judicial Committee of the Privy Council (The Lord Chancellor and Lords Watson, Macnaghten, Morris and Davey) affirmed the judgment of the Supreme Court of British Columbia, on the ground that in the absence of an express statutory enactment requiring a by-law, it was not necessary that one should be passed in order to render the corporation liable for negligence in respect of a bridge of which they have in fact assumed the control.

DOMINION RAILWAY—PROVINCIAL LEGISLATURE, POWERS OF.

In *Madden v. Nelson & Fort Sheppard Ry. Co.* (1899) A.C. 626, the Judicial Committee (The Lord Chancellor, Lords Watson, Hobhouse and Macnaghten, Sir Edward Fry and Sir Henry Strong) have affirmed the judgment of the Supreme Court of British Columbia holding that an act of that province purporting to make railways under Dominion control liable for cattle killed or injured on their railways unless such companies erect proper fences on their railways, is ultra vires by the provincial legislature.

W., an employee of the Canadian Pacific Railway Co., in British Columbia, a part of whose duty it was to couple and uncouple cars, was

between two cars on a side track uncoupling when the train backed and in attempting to get out of the way his feet were caught in the long grass and weeds which had accumulated on the road bed, whereby he was struck by the train and seriously injured. In an action to recover damages for such injury,

Held, affirming the judgment of the Supreme Court of British Columbia, 6 B.C. Rep. 561, that permitting the grass and weeds to accumulate on the side track was not such negligence on the part of the company as would render them liable in damages to W. Appeal dismissed with costs.

Martin, Q.C., for appellant. *Nesbitt*, Q.C., for respondent.

Province of Ontario.

HIGH COURT OF JUSTICE.

Rose, J.]

[Nov. 24, 1899.

RE FOSTER AND THE CITY OF HAMILTON.

Municipal law—Board of Health—License—Delegation of power to cancel.

A municipal corporation cannot delegate to a Board of Health any power to cancel a license which it may have under 62 Vict. (2nd sess.) c. 26, s. 37 (2) (6), and a by-law delegating such power was quashed. *Hodge v. The Queen* (1883) 9 App. Cas. 117, and *The Queen v. Burah* (1878) 3 App. Cas. 889 referred to.

Staunton, for the motion. *MacKelcan*, Q.C., contra.

Meredith, C.J., Rose and MacMahon, JJ.]

[Dec. 8, 1899.

GOLDIE & McCULLOCH CO. v. HARPER.

Sale of goods—Possession to vendee—Promissory note for price—Property not to pass—Loss of goods by fire—Liability.

The plaintiffs sold and delivered certain machinery to the defendant, receiving part of the price in cash and part in notes, and by the contract of sale it was provided that no property in the machinery should pass to the defendant until it was paid for. The machinery was destroyed by fire before the notes were paid. In an action on one of the notes it was

Held, that the defendant had the possession and use of the machinery and an interest in it; that there was not a total failure of consideration for the note or a partial failure which was ascertained, and that the plaintiffs were entitled to recover.

Aylesworth, Q.C., for the appeal. *Wallace Nesbitt*, Q.C., and *H. E. Rose*, contra.

Trial of Actions. MacMahon, J.]

[Dec. 13, 1899.

MCQUILLAN v. TOWN OF ST. MARY'S.

Municipal corporation—Action of negligence—Ice on sidewalk—Notice before action—Sufficiency of—R.S.O. c. 223, s. 606, s.s. 3.

This was an action to recover damages for injuries alleged to have been sustained by plaintiff owing to his slipping on a quantity of snow and ice in a street in the town of St. Mary's, which the defendants were alleged to have negligently allowed to accumulate. The statutory notice (R.S.O. c. 223, s. 606, s.s. 3) given on behalf of the plaintiff described it as having taken place opposite to a certain shop, whereas, in fact, it took place opposite a different shop about twenty feet further on, on the same side of the street.

Held, that the notice was sufficient, as it gave information enough to enable the corporation to investigate, and that is all that can be called for.

Maybee, Q.C., for plaintiff. *Idington*, Q.C., for defendant.

Meredith, C.J., Rose and MacMahon, JJ.]

[Dec. 13, 1899.

SWAIZIE v. SWAIZIE.

Foreign judgment—Granting divorce and alimony—Domicile—Jurisdiction—Submission to—Effect of production of record—Rebuttable presumption—Dealing with lands in Ontario.

In an action on a judgment of a foreign State, granting a husband a divorce and a wife a sum of money as alimony, it was contended by the husband that as he had never acquired the necessary domicile to give the foreign Court jurisdiction to grant the divorce, the judgment was invalid.

Held, that as he had invoked and submitted to the jurisdiction of the foreign Court, he had precluded himself from setting up any want of jurisdiction.

Held, also, that in the absence of anything appearing on the face of the proceedings to shew want of jurisdiction, the production of the record was prima facie evidence entitling the plaintiff to recover, and although the presumption in favour of the judgment may be rebutted, clear proofs of facts to shew want of jurisdiction must be adduced.

Semble, the judgment being pronounced in a proceeding instituted by the husband which the Court had jurisdiction to entertain, in which it was competent for the Court, when dissolving the marriage, to direct a division of the husband's property, including his Ontario lands, it would be anomalous that he, having by his own act submitted to the Court so doing, and having obtained his divorce on that condition, should be heard to say that the Court had no power to deal with the lands in Ontario.

Judgment of ROBERTSON, J., reversed.

German, Q.C., for the appeal. *A. J. Russell Snow*, contra.

Meredith, C.J.]

[Dec. 16, 1899.]

IN RE BURNETT AND TOWN OF DURHAM.

Arbitration and award—Motion to set aside award—Time—Publication—R.S.O. c. 223, s. 465—Arbitrator—Omission to take oath—R.S.O. c. 223, s. 458—Municipal corporations—Lowering grade of highway—Retaining wall—Maintenance of—Power to award—Injury to land—Interference with access—Compensation.

The six weeks allowed by s. 465 of the Municipal Act, R.S.O. c. 223, for an application to set aside an award, run from the publication to the parties of the award.

The failure of the arbitrator to take the oath required by s. 458 of the same Act is fatal to his award; but when an award is moved against on the ground of such failure it must be clearly shewn that the applicant was not aware of the omission until after the making of the award.

An arbitrator to whom is referred a claim for compensation for injury to land by reason of the lowering of the grade of the adjoining highway by the municipality has no power to direct the municipality to maintain a retaining wall.

The arbitrator has power to include in his award compensation to the landowner for injury to his land during the progress of the work by interference with the means of access thereto, and also the cost of work done to afford him such access.

Rowell, for the corporation. *W. H. Blake*, for the landowner.

Armour, C.J., Falconbridge, J.]

[Dec. 27, 1899.]

FAWKES v. SWAYZIE.

County Court Appeal—Setting down—Time—Computation—"Judgment, order, or decision"—Settlement—Power of Judge to re-settle.

The County Courts Act, R.S.O. c. 55, by s. 57 provides that "the appeal shall be set down for argument at the first sittings of a Divisional Court of the High Court of Justice which commences after the expiration of one month from the judgment, order, or decision complained of."

Held, that the month begins to run from the date of the judicial opinion or decision, oral or written, pronounced or delivered, and the judgment or order founded upon it must be referred to that date. If such opinion or decision is not pronounced or delivered in open court, it cannot be said to be pronounced or delivered until the parties are notified of it.

Quære, whether after a judgment has been settled and entered, the Judge has power to re-settle it.

Wallace Nesbitt, Q.C., for plaintiffs. *Shepley*, Q.C., for defendant.

Boyd, C., Ferguson, J., Robertson, J.]

[Jan. 2.

COWAN v. FISHER.

Contract—Breach—Condition precedent—Divisible contract.

The defendant agreed to buy a machine, the said agreement being in the form of an order signed by the defendant and adopted and accepted by the plaintiff, who shipped the machine ordered and now sued for the price. It had been a term or condition of the agreement that M., the inventor of the machine and the plaintiff's agents for sales of it, should personally inspect the placing of the machine in operation. This M. failed to do, but the plaintiff sent a competent person to set the machine up, whom, however, the defendant would not allow to do so inasmuch as M. was not present.

Held, that the plaintiff, nevertheless, was entitled to judgment for the price of the machine on the principle that unless the non-performance alleged in breach of a contract goes to the whole root and consideration of it, the part broken is not to be considered as a condition precedent, but as a distinct covenant, for the breach of which the party injured may be compensated in damages.

S. H. Blake, Q.C., and *Gwyn*, for defendant Fisher; *E. F. B. Johnston*, Q.C., for plaintiff.

Armour, C.J., Falconbridge, J., Street, J.]

[Jan. 2.

MYERS v. BRANTFORD STREET R. W. CO.

Street railways—Operation of electric car—Duty of motorman—Frightening horses—Nonsuit.

It is the duty of a motorman, operating an electric car upon a public street, if he sees a horse in the street before him that is greatly frightened at the car, so as to endanger his driver or other persons in the street, to do what he reasonably can in the management of his car to diminish the fright of the horse; and it is also his duty in running the car to look out and see whether, by frightening horses or otherwise, he is putting in peril other persons lawfully using the street on foot or with teams. *Ellis v. Lynn and Boston R. W. Co.*, 160 Mass. 341, applied.

Held, in this case, STREET, J., dissenting, that the fair inference from the evidence was that the motorman saw that the plaintiff's horses were becoming frightened by the moving car, and that they were likely to become unmanageable and run away, and that he saw the signal given by the plaintiff and understood it to be a signal for him to stop the car; and it was his duty, under these circumstances, to do what he reasonably could to avoid the obvious danger; and the case should not have been withdrawn from the jury.

Brewster, Q.C., for plaintiff. *Sweet*, for defendants.

Boyd, C., Falconbridge, J.]

[Jan. 9.]

HARRIS v. BANK OF BRITISH NORTH AMERICA.

Interpleader—Summary application—Rule 1103 (a)—Money in bank—Adverse claims—Foreign claimants—Jurisdiction.

The decision of ROSE, J., affirming an order of the Master in Chambers which dismissed a summary application for an interpleader order in respect of certain moneys deposited with the defendants and claimed by the plaintiff by this action brought in Ontario, and also by an English corporation by an action brought in England, was affirmed on appeal.

Held, that the mere fact that an action was possible here, because a branch office of the bank was in Toronto, was not enough to attract to this forum the extraordinary or special remedy by way of interpleader, as against the English corporation; and a salutary discretion was exercised in refusing the application.

John Greer, for defendants. *D. O. Cameron*, for plaintiffs. *W. H. Blake*, for other claimants.

Armour, C.J.]

IN RE JACKSON v. CLARK.

[Jan. 13.]

Mandamus—Division Court—Committal of judgment debtor—Non-production of books—Notice of motion—Uncertificated solicitor.

Motion by the plaintiff for a mandamus to the second junior Judge of the County Court of York directing him to commit the defendant for non-production of his books under a subpoena duces tecum, and pursuant to notice, on his examination as a judgment debtor under s. 243 of the Division Courts Act, in a plaint in the first Division Court in the county of York. The Judge refused to commit because, there being no express provision in the Division Courts Act authorizing a committal for non-production of books, and the liberty of the subject being involved, he thought it wiser to take that course.

Held, without expressing any opinion as to whether the Judge was right or wrong in his view, in favour of which there was a good deal to be said, that the Judge having given judgment in a matter within his jurisdiction, mandamus would not lie to compel him to give a different judgment. A preliminary objection that the notice of motion was given by an uncertificated solicitor was answered by *Sparling v. Brereton*, L.R. 2 Eq. 64. Motion dismissed with costs.

Langley, for plaintiff. *W. R. Smyth*, for defendant.

Province of Manitoba.

QUEEN'S BENCH.

Dubuc, J.]

MILLER v. McCUAIG.

[Dec. 21, 1899.

*Fraudulent conveyance—Purchase of land by debtor in name of another—
Evidence—Presumption.*

This was an action for the purpose of having it declared that the S.E. $\frac{1}{4}$ 29-13-7 W. purchased from the Dominion Government in the name of the defendant, was the property of his brother, the defendant, Roderick, and should be sold to realize the plaintiff's registered judgment against Roderick. At the time of the purchase in 1888, Roderick was indebted to the plaintiff in \$1,800, and to another person in \$4,000, and it was shewn that John had never paid anything on the land either for purchase money or taxes, and had never received anything by way of rents or profits; also that the money for the first instalment had been advanced by another brother, Duncan, that Roderick had paid the rest of the purchase money from the proceeds of the land of which he had always enjoyed the use and occupation, either by himself or by tenants, who paid their rents to him, and that the Crown patent for the property was issued to John in 1892 without his having applied for it. The defendants at their examination for discovery before the trial swore that the whole transaction was bona fide, and that Roderick was John's agent throughout in respect of the property, but Roderick was not called as a witness for the defence, and several of the defendant's relatives who had been subpoenaed by the plaintiff to attend the trial as witnesses failed to appear.

John, also in a letter to Roderick, written in 1889, referred to the property as "your land."

Held, that the proper conclusion upon the whole evidence was that the land was really Roderick's property and had been purchased and held in John's name for the purpose of preventing creditors from realizing out of it, and that the plaintiff was entitled to the relief asked for.

Semble, that when a defendant who is in court does not give evidence to support his case, the judge is entitled to make every reasonable presumption against him: *Barker v. Furlong* (1891) 2 Ch. 172, per Romer, J., at p. 184.

Anderson, for plaintiff. *Cooper*, for defendant.

Province of British Columbia.

SUPREME COURT.

Drake, J.] DART v. ST. KEVERNE MINING CO.

Mining law—Location embracing unconnected strips of land—Whether good—Mineral Acts 1891 and 1893.

Action brought by way of special case to decide whether or not a miner can locate a claim on each side of a prior location under one record. The O. B. R. claim was recorded on 16th of August, 1894, and the only unoccupied land was a strip lying N.E. of the Exeter claim, and a strip lying S. W. of the Exeter claim, but divided further on the east by the Slocan Boy. The two pieces of land which the defendants claimed were thus divided by lawfully occupied and recorded mining claims.

Held, that two strips of land unconnected with each other, although within the statutory limit of 1,500 feet, cannot be embraced in one location and record.

Wilson, Q.C., for plaintiff. *John Elliot*, for defendants.

Irving, J.] GIBSON v. MCARTHUR. [Dec. 20, 1899.

Mining law—Adverse action—Mineral claim—Bill of sale—Fraud.

W. sold certain mineral claims called the Big Four group to A., who sold in turn to the defendants after which W. as agent for the plaintiff located a fraction between two of the claims in the plaintiff's name.

Held, that defendants had no right to the fraction in the absence of proof of fraud by W., and that the plaintiff was a party thereto; and held also, that the defendants could not invoke against the plaintiff a statement in a bill of sale from H. to W. that the end of the two claims between which the fraction in question was located, adjoined each other.

J. A. Macdonald, for plaintiff. *Hamilton*, for defendants.

COUNTY COURT.

Drake, J.] SHAWNIGAN LAKE LUMBER CO. v. FAIRFULL. [Jan. 4.

COBURN, Garnishee.

Costs of garnishee proceedings—Not allowed when defendant pays money into court before judgment.

Action commenced in the County Court of Victoria, on Dec. 23, 1899, for the recovery of \$22.25. The defendant was served with the default

summons the same day it was issued, and on 28th December, he tendered the Registrar \$27.75, in full payment of the claim and costs, but the garnishee had already paid into court \$29.75 in full of the claim and cost of the garnishee summons. The Registrar did not receive the money from the defendant, and under the circumstances would not enter judgment until the matter had been mentioned to the Judge, and on Jan. 4th, 1900, the case was called before DRAKE, J.

Jay, for the defendant contended that as his client had tendered the money before judgment, and within the eight days' limit mentioned in the default summons, he could not be made to pay the costs of the garnishee summons.

Higgins, contra.

Held, that the defendant should not be made to pay the costs of the garnishee summons.

Flotsam and Jetsam.

THE eloquent tribute of the Irish Lord Chief Justice to the late Mr. Justice O'Brien is worthy of reproduction in the most prominent form: His Lordship said that the Bench would sorely miss the late Judge's great learning, his rapid appreciation of legal propositions, the infinite charm of his literary attainments, the rare and matchless eloquence which graced and elevated all his judgments and all his public life. They should see no more the sparkle of that bright and lambent wit that left no wound. They should ever remember his unfaltering love of justice, his conspicuous fortitude in the discharge of his official duties. His intrepid nature knew not how to fear. One might say of him the best thing that could be said of any man in judicial life—that to attain justice and to be credited by all honorable and candid minds with a desire to attain it was at once his object and his reward.

FRENCH JUSTICE.—Two things stand out with great prominence in the American view of the Dreyfus trial. One is the extraordinary character of French procedure, and the other is an apparent deficiency in the character of the French people. The ludicrous medley of hearsay, gossip, beliefs, suspicions, imaginings, and emotions received by the French court as evidence is a surprising burlesque upon judicial procedure. Even if the judges should disregard what is palpably irrelevant, that would not prevent it from being absurd. To permit a witness to strut before the court in a grandiose way, and declare that upon his honor he believes the prisoner guilty, is in the highest degree ludicrous. The judges may not attribute quite so much importance to the belief of the witness as he himself does,

but the fact that they receive it as evidence, and even allow him to tell what some other person also believes, is sufficient to shew that they are ready to give at least some weight to those beliefs. But every person who has any acquaintance with the unreasonable prejudices and unaccountable beliefs that are by no means uncommon among men can see that any tribunal which takes into account the beliefs of witnesses on the question of the guilt of an accused person is in great danger of doing injustice. The exhibition of French character made in this prosecution has been strikingly unfavorable. The conspiracies, the prejudices, and the forgeries revealed in this prosecution are enough to set the world aghast. Probably no other trial ever disclosed so many evidences of corruption among officials to aid a prosecution. It seems difficult to escape the conviction that there was a deliberate and cold-blooded purpose on the part of some of them to work the ruin of an innocent man. Still more significant, perhaps, is the avowed justification of infamous acts on the ground that the good of France required them. It is not a compliment to the character of the French people to have a sane person offer them such a defense for polluting the fountains of justice. To make such a claim of justification pre-supposes some idea that it will be thought a respectable one; and according to all reports it seems to be taken seriously by many of the French people. In seeking for the reasons why the French people are losing their prestige among the nations we may well believe that the chief of all these reasons is a lack of deep and strong moral character, of which one of the noblest attributes is a sturdy sense of justice.—*Case and Comment.*—U.S.

The performance of the duty of a street railway company to maintain and operate its road for the benefit of the public is held, in *State ex rel. Bridgeton v. Bridgeton & Millville Traction Co.* (N.J.) 45 L.R.A. 837, to be enforceable by mandamus.

The liability of a sleeping-car company for theft of a passenger's effects while he is asleep is denied in *Pullman's Palace Car Co. v. Adams* (Ala.) 45 L.R.A. 767, if the company has exercised reasonable diligence; but the mere fact that the porter did not go to sleep during his watch is not deemed sufficient proof of such diligence. The theft of a ring carried in a pocket book, and which is not capable of being used on the journey, is held not to make the company liable, even if its loss was due to the company's negligence.

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There is perhaps no delusion more enticing to the ordinary lay mind than the suggestion that some vast sum of money is in court awaiting claimants. We have had numerous associations formed of late years for the purpose of pursuing these "will-o'-the-wisps," which, after spending large sums of money, have succeeded in neither discovering or recovering anything. It is, therefore, a pleasing change to find that occasionally a pursuit of this kind does end more satisfactorily. Such a case recently occurred in Ireland. It appears that a vintner named Robert Smyth became bankrupt in 1797, and shortly afterwards the creditors' assignee brought a suit in the Irish Court of Chancery to establish the bankrupt's right to a moiety of a rent payable out of certain lands; and a sum of £500 was paid into court to abide the result of the suit. The assignee died, the records of the bankrupt's estate were lost, and the suit in Chancery lapsed. Recently a Mr. Maconochy discovered the fund to be still in court, and has by his researches discovered the creditors entitled to the fund, which, with interest, now amounts to £3,335 3s. 10d., and the rent has also been realized for £1,620, making a total of nearly £5,000 now divisible, and which it is supposed will pay a dividend of 16s. on the pound to the long waiting creditors, or, perhaps we should say, their representatives. The High Court for Ontario has, we think, made a very reasonable provision stopping the allowance of interest, after a certain period, on unclaimed funds in such cases as this.

CONTRABAND AND THE AMERICAN CIVIL WAR CASES.

It has been well said that on the breaking out of war the duties of neutrals are much more in evidence than their rights. Generally speaking, a neutral "is to carry himself with perfect equality between both belligerents, giving neither the one nor the other the advantage." In the English view Her Majesty's subjects are forbidden to break any blockade, to carry despatches, officers, soldiers, arms, military stores and material, and any articles considered to be contraband of war according to the law or modern

usage of nations, for the use or service of either of the contending parties. The penalty for the breach is the risk of capture and condemnation, a fate from which the Government expressly disclaims the power or desire to protect.

The warning given above, which forms an excellent précis of the law of nations on the subject of contraband, forbids the transportation, but not the trade. The traffic is lawful enough, and if the traffic involve ocean carriage it is only on the high seas that the ship and cargo may find itself in peril. But such carrying, while exposing the property of the individual citizen to the hazards of war, and the possibility of loss without the protection of his Government, does not involve the latter in any breach of national neutrality. As has been said, neutrality is not a change but a continuation of a former state, and the breaking out of war does not make that unlawful which was lawful before it.

"A neutral nation," Chancellor Kent says, "has nothing to do with the war, and is under no moral obligation to abandon or abridge its trade. . . . The trade by a neutral in articles contraband of war is, therefore, a lawful trade, though a trade, from necessity, subject to inconvenience and loss" (a).

War undoubtedly confers certain rights on belligerents which interrupt peaceful trading. Either belligerent nation may declare goods to be contraband which were not contraband before or blockade the enemy's ports, in which cases traffic carried on by neutrals must suffer some disturbance.

Lord Stowell lays down the rights which a belligerent may exercise against a neutral as follows :—1. To send on board for the ship's papers. 2. To detain such vessels as are carrying cargoes of a contraband character, either wholly or in part, to an enemy's port. 3. To bring in for a more deliberate enquiry than could possibly be conducted at sea, even those vessels which profess to carry cargoes to a neutral destination. But these rights are preliminary only. The search, the detention, and the bringing in, are all merely steps towards a judicial determination, and the question to be decided is always whether what is carried is contraband. And contraband is a term which is very elastic. In fact goods may be made contraband by the declaration of one of the contending nations, provided they are of such a nature as to afford

(a) *Seton v. Low*, 1 Johnson's cases, p. 1.

nourishment or support to the forces of the other. Hence food-stuffs, innocent though they be in themselves, may be made contraband.

Two important qualifications, however, have heretofore been insisted on, an examination of which will throw much light on the law relating to the recent seizures by British cruisers off the Portuguese port of Lorenzo Marquez. One is that otherwise innocent goods must be in transit to the enemy's forces. Hence Lord Salisbury's declaration that flour, bound to a neutral port and not destined for the enemy, will not be deemed contraband, has given satisfaction to the American and German governments. The other qualification is that goods otherwise contraband, if bound to a neutral port are not deemed to possess a hostile quality. It is to be noticed that in the brief cabled reports of the position of the British Government two very significant positions are indicated, namely, that the destination of the goods is yet an element, though the ship be bound for a neutral port, and that a Prize Court must decide the questions involved. The latter proposition is elementary, but taken in connection with the former it may mean much. For it indicates that the British Government intend to secure recognition by the Prize Court of the doctrine involved in what are known as the American Civil War Cases. Broadly speaking, those cases laid down the principle that if a neutral vessel bound for a neutral port carries contraband of war, really in transit, beyond that port, to the enemy, the destination of the vessel did not protect the goods from capture and condemnation. In the *Peterhoff* (b) a British ship was, during the American civil war, proceeding to Metamoras, a neutral port in Mexico, carrying contraband of war. She was captured on the high seas and the United States Supreme Court, in appeal from the Prize Court, condemned part of her cargo on the ground that the neutral port was not the real destination of the goods. In this they applied to the carrying of contraband the principle of cases where ships were intending to break the blockade, such as the *Springbok* (c). In that case a British ship was seized on a voyage to a neutral port, Nassau, and her cargo was condemned on the ground that the goods were really intended to be carried beyond Nassau into a

(b) 5 Wallace 28.

(c) 5 Wallace 1.

port in the Confederate States then blockaded by the Federal navy. This seizure elicited an emphatic protest from the British Government, and the Law Officers of the Crown, Sir William Atherton, Sir Roundell Palmer, and Dr. Phillimore advised that the facts afforded no ground for the seizure. The charge was, however, that they intended to break the blockade instituted by the Federal Government against Confederate ports. Under such conditions, intent has always been held to be of the first importance, and the offence was complete if the vessel sailed for the blockaded port with knowledge of the blockade (d). But in the *Peterhoff* case the port of destination was a neutral port. *Metamoras* was on the south bank of the Rio Grande and across the river was Confederate territory. The Supreme Court distinctly held that the voyage was to a neutral port, and it refused to condemn the ship or the neutral cargo for intended breach of blockade, holding that there could be no blockade of a neutral port. But the contention which was ultimately given effect to as the contraband part of the cargo was, that although the goods were to be landed on the south side in neutral territory they were intended for the Confederate States, to which they could be transported with great ease, either with or without the connivance of the Mexican authorities.

Chief Justice Chase says (e):—"Contraband merchandise is subject to a different rule in respect to ulterior destination than that which applies to merchandise not contraband. . . . The former" (is liable to capture) "when destined to the hostile country or to the actual military or naval use of the enemy whether blockaded or not. . . . Hence . . . articles of a contraband character, destined in fact to a State in rebellion, or for the use of the rebel military forces, were liable to capture though primarily destined to Matamoras."

Duer, an American writer, in his work on insurance (1845) states this proposition. "Although the ship, in which the goods are embarked, is destined to a neutral port, where the goods are to be unladen, yet if they are to be transported thence, whatever may be the mode of conveyance, to an enemy's port or territory,

(d) *The Columbia*, 1 C. Rob. 154. Walker's Science of International Law (1893) 524.

(e) p. 59.

their ultimate destination determines the character of the trade, which is not at all varied by the interposition of the neutral port. In every such case the outward voyage is illegal at its inception. The goods shipped are liable to seizure the instant it commences" (f). Dr. Holland, Professor of International Law at Oxford, has, it is stated, recently given his opinion that the present seizures made by British cruisers are justified by the American civil war cases.

But the English view has not at any time been clearly favorable to the underlying principle of those cases, which disregard the interposition of the neutral destination of the vessel. This is very well set out in *Hobbs v. Henning* (g), a case brought by an owner of part of the cargo of the *Peterhoff* on his insurance policy against the underwriters. Erle, C.J., and Byles, J., who gave judgment, declined to follow the findings of facts of the Judge in the American Prize Court, and after quoting Sir W. Scott's judgment in the *Inima* (h), affirmed that the right of capture only attaches when a ship with contraband of war is passing on the high seas to an enemy port and that it must be taken in delicto, that is, in actual prosecution of a voyage to an enemy's port. Strange to say in the most recent edition of Phillimore's Commentaries upon International Law (i) it is stated that Lord Chief Justice Erle is in accordance with the decision in the *Peterhoff* case in the Supreme Court, although that Court had affirmed the Prize Court Judge as to the contraband goods, and forfeited them. Dr. Phillimore's view is not that of other law writers nor of the Court in a subsequent insurance case, also on a policy on goods carried in the *Peterhoff* (j).

Wheaton points out the difference between the English and American decisions, and says that it cannot be foreseen which of

(f) Lecture VI., 513.

(g) 17 C. B.N.S. 791.

(h) 3 Rob. 167.

(i) (1885) 3rd Ed. p. 397.

(j) *Seymour v. L. & P. Insurance Company*, 41 L.J.N.S.C.P. 193, 42 L.J.N.S.C.P., 111 note. It is somewhat singular that Sir William Harcourt in his celebrated letters on International Law should have said in 1863 that the validity or invalidity of an insurance on a contraband voyage had not then been absolutely decided by the English Courts, principally, he observes, because the insurance companies have been too honest or too prudent to dispute the force of liabilities from which they have derived large profits.

the question of continuous voyage under the rule of war of 1756, was decided by the Lords Commissioners in Appeal in prize cases on the basis that the true question of the importation of goods into a neutral country was whether it was real or pretended only, and not whether the pretence was carried out by the entry and payment of duty to the neutral State, that is, whether the cargo was from the beginning intended for an enemy port. Sir Wm. Grant in the judgment says (s):—"The truth may not always be discernable but when it is discovered it is according to the truth and not according to the fiction that we are to give the transaction its character and denomination." After the case of *Hobbs v. Henning* had been decided an action was brought on another policy of insurance on goods on the *Peterhoff* (t), in which policy it was warranted that there was no contraband of war. The goods in question included artillery harness, and the Court inferred that they were intended for the Confederate States. In deciding that the underwriters were not liable, Willes, J., discusses the judgment in the case of *Hobbs v. Henning* and the question of destination and says (u):—"The design and intention from the beginning. . . . was that the goods should go, and they were bound from the time they left England to go, into the Confederate States." After discussing the American Prize Court decisions he proceeds:—"This is a case . . . in which there was an entire adventure which was to be completed in the country into which the goods were to go. . . . I take it to be clear that a neutral can no more rightly import arms of war into a belligerent country without being liable to have his goods seized on the way, than his government, being neutral, can import a cargo of arms into a belligerent country without creating a casus belli. That is the true character in which contraband can be seized. . . . It is an act which is in its character hostile by reason of the destination of the goods." The judgment is also instructive in explaining that Sir Wm. Scott in the *Inima*, when speaking of a "voyage to an enemy's port" meant "destination of the goods to an enemy's port," and that his expression must be construed as equivalent to "the course of procedure to the place where the goods were bound to in the beginning." In that case, however,

(s) p. 396.

(t) *Seymour v. London & Provincial Ins. Co.* 41 L.J.N.S. C.P. 193.

(u) pp. 194, 196.

Sir William Scott's definition of the elements of contraband is stated with a precision not always followed and perhaps not always appreciated, that "goods going to a neutral port cannot come under the description of contraband." Sir Wm. Harcourt's remark when quoting this, "in a question of contraband, the destination of the ship is everything," must be taken as intended to relate to a case where no question of ulterior destination arises. M. Thouvenel in his despatch on the Trent affair is clear:—"She (the Trent) was carrying to a neutral country her cargo and her passengers, and, moreover, it was to a neutral port that they were taken." To quote Sir Wm. Harcourt again, there appears in his letters on the affair of the Trent (1863) the opinion that in order to constitute contraband of war it is absolutely essential that two elements should concur, viz., a hostile quality and a hostile destination, and that hostile goods, such as munitions of war, going to a neutral port, are not contraband. He points out by way of illustration (which, however striking, only confuses the point) that a different principle would, assuming that the Confederate delegates were contraband of war, have justified Captain Wilkes in seizing the Dover Packet boat in case Messrs. Mason and Slidell had taken a through ticket from London to Paris. But Lord Russell, replying to Mr. Seward's despatch, accurately quotes Lord Stowell in the *Inima* case: "Goods going to a neutral port cannot come under the description of contraband, all goods going there being equally lawful."

In 1810, the rule laid down in 1808, that despatches were contraband was modified so as not to include despatches to enemy officials in a neutral country, and the reason given was because the destination was not necessarily hostile. In 1870 Great Britain acted on the principle that destination was the determining factor, and declined to permit coal to be supplied to the French fleet in the North Sea.

Prof. Bernard in writing on the Trent affair says:—"The fact that the voyage is to end at a neutral port is not conclusive against condemnation, but is a strong argument against it" (v). Walker, in his work on the Science of International Law says:—"The obnoxiousness of contraband trading consisting in the union of

(v) Neutrality of Great Britain during American Civil War, p. 224.

the nature of the goods as useful in war with their intended employment, a hostile destination is a necessary ground for any belligerent seizure. A simulated and innocent may, however, cover a real hostile destination and if the existence of fraud in this respect be made apparent the condemnation of the goods and possibly of the vessel may well follow (*w*).

In international law, as in every other department of jurisprudence, circumstances alter cases, and modern judges are prone to consider the actual facts of the case. If the importation of contraband into a neutral port by a neutral vessel is but part of the transitus, and the circumstances are such that no honest ship-owner could doubt the real destination, he cannot complain if a belligerent exercises rights which may detain his ship. In the case of munitions of war shipped from Germany to Lorenzo Marquez, the German Mail Steamship Company could have had no doubt that the cargo was on its way to the Transvaal. The American civil war cases were decided on circumstances practically similar to those now existing. The British Government submitted to the right then claimed, though it was quite possible to argue that the American law was somewhat in advance of English decisions. England must face the changed conditions. If the application of force is required to prevent the Transvaal getting in supplies, neutral nations will have to submit. It is of course a step in advance on the old-fashioned doctrine invoked by the German Chancellor that trade between two neutral ports in a neutral bottom must not be interfered with. But that rule has always been founded on bona fides and the English Courts have evidently assumed it as an element in their decisions. If neutrals are taking a part in conveying contraband of war to the Transvaal and using a neutral port as a transshipping depot they cannot complain if the seizure of the obnoxious articles cause them some loss and annoyance.

(*w*) p. 512.

 ENGLISH CASES.

 EDITORIAL REVIEW OF CURRENT ENGLISH
DECISIONS.

(Registered in accordance with the Copyright Act.)

LANDLORD AND TENANT — EXECUTION AGAINST TENANT — BANKRUPTCY OF TENANT—RENT IN ARREAR—PRIORITY OF LANDLORD—8 ANNE, c. 14 (c. 18 IN REV. STATS.), s. 1—TRUSTEE—COSTS.

In re Neil Mackenzie (1899) 2 Q.B. 566, is a case which, although a bankruptcy one, deserves careful attention, from the fact that the Court of Appeal has laid down the law under the statute, 8 Anne, c. 14 (c. 18 in the Rev. Stats.) governing the rights of a landlord as against execution creditors and trustees in bankruptcy. In this case the point at issue was this: A sheriff had seized in execution and sold the goods of a tenant, and subsequently received notice from a trustee in bankruptcy of the tenant having been adjudicated bankrupt, and a demand of the proceeds of the sale; the landlord of the premises on which the execution was levied also gave notice to the sheriff of his claim for rent, but the notice was not given until after the sale. The question was, therefore, whether, under these circumstances, the landlord or the trustee had the better right. The Court of Appeal (Lindley, M.R., and Jeune, P.P.D., and Romer, L.J.,) decided that to the extent of one year's arrears of rent the landlord's claim was entitled to priority. With regard to the costs of the appeal, the trustee respondent asked that they should be ordered to be paid out of the bankrupt's estate, but this was refused and he was personally ordered to pay them. The Court refused to follow *Ex parte Stapleton* (1879) 10 Ch. D. 586, holding that the Court must consider what was the trustee's right in each particular case. We may note that the statute of Anne, under which the case was decided, is one of those Imperial statutes in force in this province by virtue of the R.S.O. c. 111, s. 1, and it is greatly to be wished that the Ontario Government would provide the public with an authentic collection of all such statutes.

PRACTICE—DISCOVERY—EXAMINATION FOR DISCOVERY.

Dalgleish v. Lowther (1899) 2 Q.B. 590, turns upon a simple point of practice. The action was for slander and the plaintiff in

the course of his examination of the defendant for discovery put the following questions: "Did you on or about the 1st March or when speak the following words of the plaintiff (*setting out words complained of*) or words to that effect? Were the said words spoken in the presence of (*two persons named in the statement of claim*) and other persons, or any of which of them?" The defendant objected to answer them. Lawrance, J., thought them to be "fishing" and oppressive and sustained his objection. The Court of Appeal (Lindley, M.R., and Jeune, P.P.D.) after consulting their colleagues of the other division of the Court of Appeal, held that the questions were proper and must be answered, and reversed the ruling of Lawrance, J.

CHOSE IN ACTION—ASSIGNMENT OF DEBT—ABSOLUTE ASSIGNMENT—JUDICATURE ACT, 1873 (36 & 37 VICT., c. 66) s. 25, s.-s. 6—(ONT. JUD. ACT, s. 58, s.-s. 5.)

The Mercantile Bank v. Evans (1899) 2 Q.B. 613, was an action brought by the plaintiffs as assignees of a debt due under an agreement. The assignment on its face shewed that it was made as security for the repayment of an advance to the assignor, and it empowered the plaintiffs to exercise all the assignor's rights and powers under the agreement. The question raised before the Court of Appeal (Lord Halsbury, L.C., and Smith and Williams, L.JJ.) was whether the plaintiffs could, under such an assignment, sue in their own names, in other words whether the assignment was "absolute" within the meaning of the Jud. Act, 1873, s. 25, s.-s. 6 (Ont. Jud. Act, s. 58, s.-s. 5), and they determined that it was not. Smith, L.J., (with whom the Lord Chancellor agreed) distinguished the case from *Comfort v. Betts* (1891) 1 Q.B. 737, where there was an absolute assignment subject to a trust in respect of the proceeds of the debt assigned; and also from *Tancred v. Delagoa Bay Ry.*, 23 Q.B.D. 239 where the assignment, though absolute, was by way of mortgage and subject to an equity of redemption, on the ground that the assignment in the present case was not an assignment of the whole agreement, but only of sufficient thereof to secure the debt due the assignor. Williams, L.J., agreed that the assignment was only partial, but did not discuss the cases above referred to.

MANDAMUS—MUNICIPAL CORPORATION—APPOINTMENT OF VACCINATION OFFICER.

In *The Queen v. Leicester* (1899) 2 Q.B. 632, an application was made for a prerogative writ of mandamus to compel a board of

guardians to appoint an officer under the Vaccination Act, which was granted by Darling and Phillimore, JJ. The application was resisted on the ground that the Act in question provided that in default of the board of guardians making the appointment within the limited time the Local Government Board, who were the prosecutors in this case, might make the appointment, but the Court was of opinion that the alternative power of appointment was not an equally beneficial remedy, and that the applicants were entitled to compel the board of guardians to perform its statutory duty.

CONTRACT—LOAN OF MONEY—FRAUD—CONCEALMENT OF IDENTITY OF LENDER—REPUDIATION OF CONTRACT.

Gordon v. Street (1899) 2 Q.B. 641, is one of those melodramatic cases which one very rarely meets with in the pages of the Law Reports. Here we have "the biter bit," and "the engineer hoist with his own petard" with a vengeance. The plaintiff was a notoriously extortionate money lender, who sought to recover from the defendant the amount of a promissory note for £150 given for a loan of £100 for a few weeks. The defence was that the defendant was induced to enter into the contract on the representation that the person he was dealing with was named Addison; that as soon as he discovered the true identity of the plaintiff he repudiated the contract and offered to repay the loan with ten per cent. interest, and he paid £110 into Court in satisfaction. He also counter-claimed for damages for libel contained in an abusive letter sent to him by the plaintiff in respect of which (as appears by the report of the case in 81 L.T. 237) the defendant recovered a verdict for £400, although the publication was only to the plaintiff's own clerk. At the trial before Bucknill, J., the jury found that the plaintiff had fraudulently concealed from the defendant his name, in order to induce the defendant to enter into the contract, and that the defendant repudiated the contract within a reasonable time after he discovered the plaintiff was the lender; judgment was therefore given for the defendant from which the plaintiff appealed. The Court of Appeal (Smith, Rigby, and Williams, L.JJ.) unanimously dismissed the appeal, holding that misrepresentation as to the name of the lender was material, and having been fraudulently made, entitled the defendant to repudiate the contract as he had done, and, by the curious irony of fate, the Court arrived at its conclusion by the help of the plaintiff's own

letters to the defendant in which, in order to terrify his victim, he graphically described himself as being "the extortionate and usurious money lender with about a gross of aliases, and the hottest and bitterest of creditors," and by his private written instructions to his employees in which he had shewn the importance which he himself attributed to the concealment of his identity. It is seldom that poetic justice is so signally done.

WEIGHTS AND MEASURES—WEIGHING MACHINE—PAPER—"FALSE OR UNJUST"
—WEIGHTS & MEASURES ACT, 1878 (41 & 42 VICT., c. 49), s. 25—(R.S.C. c. 104, s. 25.)

Lane v. Rendall (1899) 2 Q.B. 673, is a case stated by justices. The defendant was charged with an infraction of the Weights and Measures Act, (see R.S.C. c. 104, s. 25), the facts being that, in weighing tea, a piece of paper was placed under the receptacle on the scales on which tea was weighed, so that the weight indicated by the scale was $1\frac{1}{2}$ drachms more than there really was of tea. The defendant contended that in weighing tea purchased, he was entitled to include the paper in which the tea was packed, but the Court (Ridley and Darling, JJ.) repudiated the idea that a tea dealer is entitled to sell as a pound of tea, a pound in weight made up of tea and paper, and held that the defendant should be convicted of a breach of the Act.

COMPANY—DIRECTOR—MISFEASANCE—DIVIDENDS PAID OUT OF CAPITAL—LIQUIDATOR, RIGHT OF, TO RECOVER FROM DIRECTOR DIVIDENDS IMPROPERLY PAID.

In re National Bank of Wales (1899) 2 Ch. 629, was an application by a liquidator in a winding up proceeding to compel a director of the company in liquidation to make good certain moneys of the company, part of which had been improperly invested, and part applied improperly in payment of dividends, and part lost by improper advances to customers and allowing them to overdraw their accounts. The company in question had carried on a banking business, and having got into difficulties determined to transfer its business and assets, other than uncalled capital, to another company, subject to the stipulation that if the assets transferred exceeded the liabilities, the surplus should be refunded to the company in liquidation, and if, on the other hand, the assets transferred proved insufficient to discharge the liabilities, the company in liquidation should make good the difference. In the

result it turned out that there was a deficiency of £41,000 which the company in liquidation had to make good. This deficiency could easily be obtained by calling up unpaid capital, but the shareholders objected to a call being made, if the money could be recovered from other sources, and it was therefore practically in their interest that the present proceedings were taken. One ground on which the director in question claimed to be exonerated was that he had relied on the statements and reports presented to the board of directors and had no reason to doubt their accuracy, and that such statements and reports justified his action, and that he had been as much deceived by the chairman and general manager as the shareholders themselves. Wright, J., came to the conclusion that Cory, the director, had not only been negligent but fraudulent, on the ground that the directors' reports stated that they had made provision for bad and doubtful debts whereas they had not; but the Court of Appeal (Lindley, M.R., Jeune, P.P.D. and Romer, L.J.) thought the evidence failed to justify this inference; and that the director was justified in relying on the statements of the officers of the company. Another branch of the case turned on the effect of Cory's resignation of the office of director. He wrote tendering his resignation, and on 22nd Dec., 1890, he was informed of its acceptance; but the board of directors concealed this from the shareholders and in their report, laid before them on 21st January, 1891, Cory's name appeared as a director, and the evidence was conflicting as to whether his resignation had or had not been mentioned to the meeting held that day. Wright, J., thought Cory must have known that his name so appeared in the report, and that he improperly allowed his retirement to be concealed, and allowed himself to be held out as a continuing director; but the Court of Appeal was of opinion that his resignation had been bona fide and validly effected, and that he ceased to have any responsibility for the subsequent acts of the board of directors, and could not be held liable for the dividend declared in January, 1891, even if he received the directors' report before the meeting and saw his name in it as a director, and did not insist that his name should be struck out. As to the dividends previously declared after the loss of the paid up capital, the Court of Appeal, while declaring that the paid up capital of a limited company cannot be returned to the shareholders under the guise of dividends or otherwise, at the same time was of opinion that

the law does not prohibit a limited company from paying dividends unless its paid up capital is intact, the dictum of Jessel, M.R., *In re Ebbw Vale S. & I. Co.*, 4 Ch. D. 827, to the contrary notwithstanding; and that with respect to the losses properly chargeable to capital and income respectively there is no hard and fast legal rule. In determining, however, the liability of a director for dividends improperly paid by reason of the improper charging of losses to capital, the Court of Appeal held that it is the duty of the Court to examine the state of things as it appeared to the director when the dividends were declared, and to determine whether he was justified in what he did by what he then knew, or what he ought to have known; and doing so in the present case, they came to the conclusion that having no ground for suspicion that anything was wrong, Cory was justified in giving faith to the statements and reports of the officers of the company, on the faith of which the dividends had been declared. Another ground on which he was sought to be made liable was for having, as alleged, sanctioned a loan to a director without security. The articles of association provided that the company was to have a first charge on the shares of all shareholders for any debts due by them to the company. The articles also provided that no advances were to be made to directors without security. Advances were made to a director the market value of whose shares at the time largely exceeded the advances, but in respect of which advances a heavy loss was ultimately sustained. The Court of Appeal held that a charge on the shares given by the articles was a "security," and that Cory was not liable, having no reason to suspect that the security was insufficient. The Court of Appeal, however, agreed with Wright, J., that if Cory had been liable for dividends improperly paid out of capital the liquidator might recover the amount from him as an asset of the company, and that it could not be maintained that the liquidator had no right to recover them because he represented the shareholders to whom they had been paid.

TRADE UNION—"WATCHING AND BESETTING"—INTERLOCUTORY INJUNCTION—CONSPIRACY AND PROTECTION OF PROPERTY ACT, 1875, (38 & 39 VICT., c. 86), s. 7—(CR. CODE, s. 523)—PARTIES—MISJOINDER—RULE 123 (ONT. RULE 185).

Walters v. Green (1899) 2 Ch. 696, is an action founded on *Lyons v. Wilkins* (1896) 1 Ch. 811 (noted ante vol. 32, p. 546), and

was brought by a firm of builders against the officials of different Trade Union Societies, to restrain them from watching and besetting workmen brought by the plaintiffs to fill places vacated by men on strike. The present is a report of an application for an interlocutory injunction until the trial. The motion was resisted on the ground that the action was not properly constituted because the plaintiffs had not alleged any joint cause of action against all the defendants, but only separate and distinct torts against each. The plaintiffs, on the other hand, contended that the tort alleged was joint, because it was claimed that the defendants had combined and conspired together to do that which was illegal under the Conspiracy and Protection of Property Act, 1875, s. 7 (see Cr. Code s. 523), viz., to compel the plaintiffs to abstain from doing that which they had a legal right to do. Stirling, J., ruled that the action was properly constituted, both as to the plaintiffs and defendants, as the tort alleged was joint and all the plaintiffs had suffered from the same tort, and even if, in the result of the action, it should turn out that some only of the defendants were liable, judgment could be recovered against them notwithstanding the misjoinder of the others, and on the evidence, being of opinion that it was only shewn that two of the defendants had been guilty of acts forbidden by the statute in question, he granted the interlocutory injunction only as against them.

INJUNCTION—TRIVIAL INJURY—COSTS.

In *Llandudno v. Woods* (1899) 2 Ch. 705, the plaintiffs, a municipal body, entitled as leasees of the Crown to the sea shore between high and low water mark, claimed a declaration that the defendant (a clergyman) was not entitled to hold services on such sea shore without the plaintiffs' consent, and for an injunction. Cosens-Hardy, J., who tried the action made the declaration as asked, but refused to grant an injunction, on the ground that the matter was too trivial, and also made no order as to costs.

VENDOR AND PURCHASER — PURCHASE MONEY PAYABLE BY INSTALMENTS — REPUDIATION OF CONTRACT BY PURCHASER AFTER PART PAYMENT RIGHT OF VENDOR TO RETAIN PURCHASE MONEY AFTER REPUDIATION BY PURCHASER — SPECIFIC PERFORMANCE—LACHES.

Cornwall v. Henson (1899) 2 Ch. 710 is an interesting case on the law affecting vendors and purchasers. In 1892 the defendant agreed to sell to the plaintiff a parcel of land for £150, of which

£40 was paid down and the balance was to be paid in equal quarterly instalments, and in default of payment of any one instalment for thirty days all of the remaining instalments were at once to become payable, and in default of payment the vendor was to have power to sell the land, retain the unpaid instalments out of the proceeds, and pay the balance to the purchaser. The plaintiff went into possession, and in August, 1891, had paid all the instalments but one. No further payment was made, and in 1896 he left the premises, the land being then of less value than the total amount of the instalments paid. The defendant being unable to find the plaintiff, took possession and advertised the property for sale but was unable to find a purchaser. He then let the property in 1898, and gave the tenant an option to purchase. After this tenant had built a house, the plaintiff returned and tendered the remaining instalment, and claimed a conveyance, which being refused the present action for specific performance was brought. Cosens-Hardy, J., tried the action. It was conceded by plaintiff's counsel at the trial that specific performance of the contract could not be granted, and the learned Judge was of opinion that the plaintiff was not entitled to any damages against the defendant for non-performance of the contract, on the ground that his conduct shewed that he had abandoned the land and repudiated the contract, and that the defendant's rights could not be limited to the exercise of the power of sale conferred by the contract, when once it was held that the plaintiff was no longer owner in equity of the land, or entitled to a lien upon it for his purchase money. He held also that the plaintiff had resumed possession as owner, and in that capacity had made the lease with the right of purchase. He also held that the purchase money could not be recovered as money had and received to the use of the plaintiff because, the plaintiff having been let into possession, there could not be said to have been a total failure of consideration, and the action was, therefore, dismissed without costs. The learned Judge in the course of his judgment expresses the opinion that the statement that the effect of a contract of sale is to make the purchaser from that moment in equity owner of the land, needs to be modified by the proviso that the contract is one of which the Court will decree specific performance.

MARRIED WOMAN—SEPARATE ESTATE—RESTRAINT ON ANTICIPATION—DEATH OF HUSBAND—WIFE'S CONTRACT—BANKRUPTCY OF MARRIED WOMAN.

In re Wheeler, Briggs v. Ryan (1899) 2 Ch. 717 would seem to shew that the rights of a trustee on bankruptcy of a married woman trader are more extensive than those of a judgment creditor of a married woman. In this case a married woman having separate estate subject to a restraint on anticipation, having carried on a separate trade, was declared bankrupt, and her husband having died, whereby the restraint on anticipation came to an end, the trustee in bankruptcy claimed to be entitled to the married woman's life interest under the settlement, and Cosens-Hardy, J., held that he was entitled thereto. The recent case of *Softlaw v. Welch* (1899) 2 Q.B. 419 (noted ante vol. 35, p. 682) would seem to shew that an execution creditor in respect of a contract made before 1893 would not be entitled to levy execution against such a life interest, on the cesser of the restraint.

COMPANY—WINDING UP—FRAUDULENT PREFERENCE BY COMPANY.

In re Blackburn & Co. (1899) 2 Ch. 725, Wright, J., decides that a payment made by a company within the prescribed time, prior to a winding up order, for the purpose of satisfying a claim, because the directors thought it would be a hardship on the creditor and against their consciences to leave him to prove his claim in the winding up, was none the less a fraudulent preference, and as such recoverable by the liquidator.

VENDOR AND PURCHASER—PURCHASE BY TRUSTEE OF SETTLED ESTATE—POSSESSION BY TENANT FOR LIFE—PAYMENT OF INTEREST ON PURCHASE MONEY BY SUCCESSIVE TENANTS FOR LIFE—SPECIFIC PERFORMANCE—VENDOR'S LIEN.

Ecclesiastical Commissioners v. Pinney (1899) 2 Ch. 729, was an action for specific performance of a contract for the purchase of lands. The contract had been made in 1873 with the trustees of a settled estate having a power to purchase; the successive tenants for life under the settlement had been in possession of the property from the date of the contract, and had regularly paid the interest on the purchase money to the vicar of the parish of which the lands in question had been the glebe. The principal money had never been paid, and no conveyance was ever executed. The action was brought against the present tenant for life, the legal representatives of the surviving trustee of the settlement who had made the

contract, and the present trustees of the settlement; the present vicar of the parish was also a defendant. There were no trust funds of the settlement available for the payment of the purchase money. Under these circumstances, Byrne, J., held that the plaintiffs were not entitled to judgment for specific performance of the contract, but that, if the tenant in tail of the settlement consented to be added, and submitted to be bound by the judgment, the only relief they could be awarded was a declaration that they were entitled to a vendor's lien for the purchase money.

WILL—CONSTRUCTION—LEGACY—VESTING—REMOTENESS—INTESTACY—MAINTENANCE.

In re Turney, Turney v. Turney (1899) 2 Ch. 739 is a case turning on the construction of a will, whereby the testator bequeathed a sum of £12,000 to trustees upon trust to pay the income thereof to a daughter for life; and after her death to pay £1,000 to her husband, if living, and subject thereto, as to capital and income in trust for all the children of the daughter when they should attain 25, but not before, and, in case there should not be "any such child," the fund was to form part of the testator's residue. The testator also declared that until the £12,000 should be invested the trustees should pay his daughter—or, in the event of her death, to her husband and children—interest on their respective portions. The trustees were also empowered to apply for the advancement of any grandchild a sum not exceeding one-half of his expectant share for his or her advancement, &c. The trustees were also empowered to apply the whole or any part of the income arising from the expectant share of any grandchild, after the death of the preceding owner for life thereof, for the maintenance and education of such grandchild, and the unapplied income of such shares was to be accumulated and added to the principal. The question was whether the gifts to the grandchildren were vested, subject to being divested if they did not attain 25, or whether they vested only on their attaining 25. Kekewich, J., who tried the case, was of opinion that they did not vest until the grandchildren attained 25, and were, consequently, void for remoteness. The Court of Appeal (Lindley, M.R., Jeune, P.P.D., and Romer, L.J.) were of a contrary opinion, and held the gifts to be vested, subject to being divested in case the legatees did not attain 25. Jeune, P.P.D., says: "If the language of a will is ambiguous, it is right to lean rather to a construction which will

undoubtedly carry out the intention of the testator, in the sense that it will make his will effectual and not render it void by means of a doctrine from which, if he had known of it, he would certainly have desired to steer clear." The fact that the will spoke of "the share" of a child dying before attaining 25 was, in the opinion of the Court of Appeal, an indication that the testator intended an immediate vesting of the shares.

COPYRIGHT — NEWSPAPER REPORT OF SPEECH — AUTHOR — COPYRIGHT ACT, 1842 (5 & 6 VICT., C. 45), SS. 2, 3, 18.

Walter v. Lane (1899) 2 Ch. 749 is an important decision on the law of copyright. The plaintiffs, the publishers of *The Times*, claimed a copyright in reports of public speeches published in *The Times*. The reporters who had reported the speeches in question had assigned such copyright as they had to the plaintiffs. The plaintiffs applied for an interim injunction, which was granted by North, J.; but the Court of Appeal (Lindley, M.R., Jeune, P.P.D., and Romer, L.J.) reversed his decision, on the ground that the reporter of a speech cannot in any sense be considered the author of it. They, however, intimate that if a reporter of a speech gives the substance of it in his own language; if, although the ideas were not his, his expression of them is his own and not the speaker's, with immaterial differences, the reported speech, in such a case, would be an original composition, of which the reporter would be the author, and he would be entitled to copyright in his own production; and that is said to be the ground on which copyright in law reports is based. The appeal was allowed, and the action dismissed with costs.

The Forum.

A CAUSERIE OF THE LAW.

CONDUCTED BY CHARLES MORSE.

An interesting case in the law of contempt of court is that of *McLeod v. St. Aubyn*, 48 W.R. 173, noted ante p. 58. The appellant, who practiced his profession as a barrister in St. Vincent, had received by mail some copies of a certain newspaper published in Grenada containing a defamatory article against the Acting Chief Justice of the Supreme Court of St. Vincent, the respondent. Without any knowledge of the contents of the newspaper, he handed one of the copies he had received to his friend the custodian of the public library of St. Vincent, to be returned to him on the following morning. Some days thereafter he was served with an order nisi to shew cause why he should not be committed for contempt of court in publishing the said article. Although he filed an affidavit to the effect that he had not read the said article nor was aware of its contents at the time of the alleged publication by him, he was committed to prison for fourteen days by the respondent. On appeal from the order for commitment, the Judicial Committee of the Privy Council held that there was no obligation on the appellant to make himself acquainted with the contents of the newspaper, and should scandalous matter reflecting on the court thus become known, the circumstances were not in themselves sufficient to justify a committal for contempt of court. In the course of the judgment Lord Morris said that "committals for contempt of court by scandalizing the court itself have become obsolete in this country."

*** The late R. D. Blackmore was one of that bright galaxy of English writers in the present century who, being bred to the Bar, early forsook what Macklin is pleased to term the "hocus-pocus science" for the more congenial profession of letters. Mr. Blackmore, after taking a B.A. degree at Exeter College, Oxford, studied law and was called to the Bar of the Middle Temple in 1852. Two years afterwards he made his début as a litterateur with a volume of verse; but it was not until 1864 that he tried his hand at fiction, producing in that year "*Clara Vaughan*," and two years later "*Cradock Nowell*." In 1869 he won immortality by his meister-stück "*Lorna Doone*," which is one of the best novels ever written.

*** In December last the Supreme Court of the United States decided, in the case of *The Pedro*, that a vessel owned by a Spanish corporation, having a Spanish register, sailing under a Spanish flag and a Spanish license, and officered and manned by Spaniards, must be regarded as a Spanish ship for the purpose of capture as a prize, although British subjects were the legal owners of a portion, and equitable owners of the remainder, of the stock in the corporation; and intended to restore the vessel to British registry if war rendered the change desirable. The decision arrived at by the Court is in accord with the principle laid down in Hall's International Law, sec. 169; and see *The Vigilantia*, 1 C. Rob. at p. 13.

*** Apropos of the rumours of intervention by European powers on behalf of the Boers, we would refer to what Lord Castlereagh said in his Note on the Affairs of Spain, in May, 1820, namely, that "the right of intervention consists of a state of things in a foreign country which threatens other States with that direct and immediate danger, which has always been, at least, in his lordship's country, regarded as constituting the only case which justifies foreign intervention." The facts, so far as they appear at the time of writing, do not establish the right to intervene on the principle above stated; nor on the ground of the preservation of the balance of power, or any other ground sanctioning intervention under the rules of International Law.

*** In the course of an admirable address on "Our Imperial Tribunals," by Mr. Haldane, Q.C.; M.P., before the Scots Law Society recently, he delivered himself of these sage observations concerning colonial obligation to the Judicial Committee of the Privy Council: "The influence of the Privy Council had not lain only in the interpretation of the law. It had—and he might take as an example, the constitution of Canada, as created in our time by the Confederation Act of 1867—clothed what was a mere skeleton with flesh and blood, by a process of judge-made law. Gaps in the colonial constitutions had on more than one occasion been filled up, and their general law had often been amplified and moulded in the same fashion. That brought him to what was a serious matter. The colonies had developed enormously within the last few years. They had shown a desire for closer relations with the mother country in the administration

of justice, as well as in other matters. Under the bill which Lord Roseberry introduced, and which Mr. Chamberlain finally passed into law, they had for a time sent three judges, representative of different parts of the Empire, to sit in the Privy Council. Sir Henry Strong, the Chief Justice of Canada, has come over from that country; Sir Henry de Villiers, Chief Justice of the Cape, and Sir Samuel Way, one of the Australasian Chief Justices, had for a time come over as representatives of their colonies. But these eminent lawyers were required at home. They were paid no salaries for the assistance they gave to the Imperial Government, at much expense and inconvenience to themselves, and they had, in a large measure, ceased to sit at Downing Street." This last remark reveals a state of affairs unfortunate indeed, and Canada, at least, ought to be aware that it is in her best interests to enable the Chief Justice to make his duties at Downing Street of paramount importance. So far as the profession is concerned this seems to be the prevalent opinion.

REPORTS AND NOTES OF CASES

Dominion of Canada.

EXCHEQUER COURT.

Burbidge, J.]

[June 14, 1899]

GENERAL ENGINEERING CO. v. DOMINION COTTON MILLS CO. (1)

Patent of Invention—Furnace stoker—Combination—Infringement.

On the 15th October, 1892, Jones obtained a patent in Canada for alleged new and useful improvements in boiler furnaces. The distinctive feature of Jones' invention was that instead of using a fuel chamber or magazine bowl-like in shape, such as that claimed in Worthington's United States patent, he employed an oblong trough or bath-tub shaped fuel chamber with upwardly and outwardly inclined closed sides. This form of fuel chamber was suggested in the Worthington patent, but was not worked out by its inventor, it being his view apparently that several magazines or chambers bowl-like in shape could be used within the trough-shaped chamber. The Worthington patent was not commercially successful. Jones, using an oblong or trough-shaped chamber, was the first to manufacture a mechanical stoker that was commercially successful.

Between Worthington's and Jones' patent there was all the difference between failure and success.

Held, that Jones' patent was valid.

J. L. Ross and *C. A. Duclos*, for plaintiffs. *D. Macmaster*, Q.C., and *F. S. Maclellan*, Q.C., for defendants.

Burbidge, J.]

[June 14, 1899.

GENERAL ENGINEERING CO. v. DOMINION COTTON MILLS CO. (2)

Re-opening trial—Affidavit meeting evidence produced at trial.

An application was made after the hearing and argument of the cause but before judgment, for the defendants to be allowed to file as part of the record certain affidavits to support the defendant's case by additional evidence in respect of a matter upon which evidence had been given by both sides. It was open to the defendants to have moved for leave for such purpose before the hearing was closed, but no leave was asked. It also appeared that the affidavits had been based upon some experiments which had not been made on behalf of the defendants until after the hearing.

Held, that the application must be refused. *Humphrey v. The Queen*, 2 Ex. C.R. 286; and *DeKuyper v. VanDulken*, 3 Ex. C.R. 88, distinguished.

B. B. Osler, Q.C., and *J. L. Ross*, for defendants. *D. Macmaster*, Q.C., and *F. S. Maclellan*, Q.C., for plaintiffs.

Burbidge, J.]

[Jan. 10.

THE QUEEN EX REL. AMERICAN STOKER CO. v. GENERAL ENGINEERING CO.

Scire facias to repeal patent—The Patent Act, s. 34, s.-s. 2—Expiry of foreign patent—"Cause as aforesaid"—Jurisdiction.

Upon a proceeding by scire facias to set aside a patent for invention because of an alleged expiry of a foreign patent under the provisions of s. 8 of the Patent Act,

Held, that there was so much doubt as to that being one of the causes included in the expression "for cause as aforesaid" in clause 2 of s. 34 of the Act that the action should be dismissed.

B. B. Osler, Q.C., and *J. L. Ross*, for defendants. *D. Macmaster*, Q.C., and *F. S. Maclellan*, Q.C., for plaintiffs.

Province of Ontario.

COURT OF APPEAL

Practice]. ALLCROFT v. MORRISON. [Nov. 20, 1899.
Security for costs—Residence out of Ontario—"Ordinary resident"—Rule 1198.

Rule 1198 provides that security for costs may be ordered, among other cases, in the following: "(a) where the plaintiff resides out of Ontario; (b) where the plaintiff is ordinarily resident out of Ontario, though he may be temporarily resident within Ontario." The defendant's affidavit stated that the plaintiff was now residing out of the jurisdiction, and also that he had no certain place of abode within the jurisdiction; that he had hitherto resided out of the jurisdiction, and at the conclusion of the pending suit intended to reside out of the jurisdiction of the Court. The plaintiff's affidavit stated that he had not for the past year nor had he now any fixed or ordinary place of abode either in or out of the Province of Ontario, his occupation requiring that he should be from time to time in England, the Province of Ontario, and the Province of New Brunswick.

Held, that the actual residence abroad was still what *prima facie* entitled the defendant to security, and the plaintiff could not answer the application by shewing that he had no fixed residence at all. *Denier v. Marks*, 18 P.R. 465, overruled. Judgment of a Divisional Court reversed.

J. M. Clark, Q.C., for appellant. *H. D. Gamble*, for respondent.

Practice]. INDEPENDENT ORDER OF FORESTERS v. PEGG. [Jan. 25.
Summary judgment—Rule 603—Mortgage action—Claim for immediate possession—Recovery of land—Rules 138, 141.

A writ of summons was indorsed under Rule 141 with claims for foreclosure of a mortgage, and for immediate delivery of possession of the mortgaged premises, and for immediate payment of the mortgage money.

Held, that it could not be said to be specially indorsed under Rule 138 so as to entitle the plaintiffs to move under Rule 603 for summary judgment for recovery of land. Decision of a Divisional Court affirmed.

James Bicknell, for appellants. *S. B. Wood*, for respondent.

Practice]. [Jan. 25.
 IN RE CONFEDERATION LIFE ASSOCIATION AND CORDINGLY.

Interpleader—Summary application—Rule 1103 (a)—Insurance moneys—Adverse claims—Foreign claimants—Notice of motion—Service out of jurisdiction—Rule 162 (3).

Certain moneys were payable by an insurance company under several

life policies in favour of the assured, his executors, administrators, or assigns. The moneys were claimed by the executors, who resided in Manitoba, where the assured died, and who were threatening suit there, and also by the widow, who resided in Quebec, and had brought an action against the company there. The company's head office was in Ontario, and they launched an application in the High Court for a summary interpleader order.

Held, reversing the decision of a Divisional Court, 19 P.R. 16; 35 C.L.J. 537, 615, and restoring that of MEREDITH, C.J., that the company were entitled to avail themselves of the provisions of Rule 103(a), as persons under liability for a debt in respect of which they were, or expected to be, sued by two or more persons; and service out of Ontario of the company's notice of motion for the interpleader order was properly allowed under Rule 162 (3).

Riddell, Q.C., and *Snow*, for appellant. *Maclaren*, Q.C., for respondent.

HIGH COURT OF JUSTICE.

Divisional Court.]

[Dec. 16, 1899.

HARPER v. TORONTO TYPE FOUNDRY COMPANY.

Replevin—Indemnity of defendant—Replevin bond—Consol. Rule 1074.

The Consol. Rule 1074, dealing with the question of indemnity of the defendant in replevin proceedings is the statute 48 Vict., c. 13, s. 8 (O.), imported into the rules and does not give an independent cause of action, merely adding another condition to the replevin bond required to be taken by the sheriff.

Poussette, Q.C., for plaintiffs. *Ryckman*, contra.

Boyd, C.]

ATTORNEY GENERAL v. NEWMAN.

[Dec. 18, 1899.

Succession duties—Money deposited in banks—By foreign resident—Death of—Deposit receipts—R.S.O. 24.

The Succession Duty Act, R.S.O. 24, contemplates a site or locality being given to all kinds of personal property and that the domicile of the deceased owner is not to be regarded.

A resident of the United States deposited moneys in Ontario Banks at interest and took deposit receipts thereof.

Held, on his death in the States, that the moneys were liable to the Ontario succession duties.

Alfred Macdougall (Solicitor to the Treasury) and *W. E. Middleton*, for plaintiffs. *Aylesworth*, Q.C., and *J. H. Rodd*, for defendants.

Boyd, C.] MITCHELL v. TOWN OF PEMBROKE. [Dec. 21, 1899.
*Police Magistrate—Police office—Accommodation to transact business—
 Room or chamber—Municipal building—Town hall—Stationery.*

In an action by a police magistrate of a town who was also a justice of the peace for the county in which the town was situated, to compel the corporation of the town to establish a police office, as required by statute, and to reimburse him for rents paid for premises used as such and for stationery, etc.,

Held, that the defendants were not called upon to furnish facilities for the transaction of business not strictly appertaining to the office of police magistrate for the town, such as troubles arising in the county but outside the town limits.

Held, also, that it was not needful that the police office should be a separate building; that the allocation of a suitable room or chamber in any building belonging to the municipality, such as the use of the council chamber in the town hall although only up to four o'clock in the afternoon, was sufficient.

Held, also, following *Newcombe v. County of Oxford* (1895) 28 O.R. 442 that he was entitled to stationery.

Semble, that the police magistrate has no right to claim a private office in addition to a public one. *Regina v. Lee* (1887), 15 O.R. p. 359, referred to.

J. R. Metcalf, for plaintiff. *J. J. O'Meara*, for defendants.

Armour, C.J., Falconbridge, J.] [Jan. 4.

IN RE HARRISON.

Life insurance—Benefit society—Certificate—Indorsement for benefit of wife—Subsequent revocation by will—By-laws of society—R.S.O. c. 203.

A certificate of life insurance issued to a member by a benefit society stated on its face that it was subject to the provisions of the by-laws, rules and regulations of the society. One of the by-laws provided for the payment of the insurance money to any person nominated by indorsement, which indorsement might be revoked. The member, by endorsement on the certificate, directed that all money accruing upon it should be paid to his wife upon his death; but, subsequently, by will, directed that only a portion of it should be paid to her, and the balance to his half brothers and sisters.

Held, that the insurance was subject to the provisions of the Ontario Insurance Act, R.S.O. c. 203; and the by-laws and rules of the benefit society, in so far as they were inconsistent with such provisions, were to be regarded as modified and controlled by them. The statute provided in effect that when the indorsement was in favour of the wife of the member,

he could not revoke it, and the by-law was in this respect modified and controlled by the statute. *Mingaud v. Packer*, 21 O.R. 267; 19 A.R. 290, applied and followed.

F. A. Anglin, for the widow. *R. S. Smellie*, for the executor. *G. F. Macdonnell*, for the beneficiaries under the will.

Divisional Court.] FRASER *v.* ORBERNDORFER. [Jan. 15.
*Division Court—Certiorari—Discretion of High Court Judge—Res
 judicata—Refusal of Divisional Court to interfere.*

After a trial and judgment in a Division Court as to the right of a landlord to recover a month's rent under a lease, another action was brought for three months' subsequent rent, whereupon the defendant applied to a Judge of the High Court for a certiorari, which was refused, on the ground that though the case might be of importance as affecting cases of a similar nature, that was not of itself sufficient, no difficult questions of law or fact appearing to be involved.

On appeal to a Divisional Court the judgment was affirmed, the Court holding that the granting of the certiorari being left to the discretion of the judge, and he having exercised it the Court would not interfere; and moreover by the judgment of the Division Court in the first action the matter was *res judicata*.

E. Tayleur English, for the appellants. *Slaght*, contra.

Meredith, C.J., Rose, J., MacMahon, J.] [Jan. 18.

PHAIR *v.* PHAIR.

*Arrest—R.S.O. c. 80, s. 1—Intent to quit Ontario—Intent to defraud
 creditors.*

It is not sufficient for a creditor applying for an order for arrest under R.S.O. c. 80, s. 1, to shew the existence of a debt, and that the debtor is about to quit Ontario; he must shew some other fact or circumstance which, coupled with those facts, points to an intent to defraud. *Shaw v. McKensie*, 6 S.C.R. 181, *Tooth v. Frederick*, 14 P.R. 287, and the opinions of BURTON and MACLENNAN, JJ.A., in *Coffey v. Scane*, 22 A.R. 269, followed. The opinions of HAGARTY, C.J.O., and OSLER, J.A., in *Coffey v. Scane*, and the case of *Robertson v. Coulton*, 9 P.R. 16, dissented from. *McVeain v. Ridler*, 17 P.R. 353, discussed.

Whether or not there is good and reasonable cause for believing that the intent to defraud exists, is a question of fact.

Where the defendant believed that his wife had no claim against him for alimony:—*Held*, that he could not be intending to defraud her by leaving Ontario.

Grayson Smith, for plaintiff. *J. H. Moss*, for defendant.

Boyd, C.] RE ALLEN AND NASMITH. [Jan. 23.
Lessor and lessee—Renewable lease—Buildings erected by tenant—Absence of covenant as to—Fixing rent on renewal—"Ground rent."

A renewal lease is a continuation of the old lease and if rent for the buildings erected by the tenant is not provided for under the first lease, neither should it be under the extension in the absence of express provision. And an application to refer back an award in a case where a tenant had a renewable lease and had during the first lease erected buildings on the premises, nothing being said in the lease about buildings, and where the arbitrators in arriving at the rent for the renewed term had fixed a "ground rent" without taking the buildings into consideration was dismissed with costs.

Aylesworth, Q.C., for the motion. Snow, contra.

Armour, C.J., Falconbridge, J., Street, J.] [Jan. 29-
 STANLEY v. LITT.

Interlocutory judgment—Assessment of damages—Slander—Rule 578.

The action was commenced by writ of summons indorsed, "The plaintiff's claim is for damages for slander." No appearance having been entered, the plaintiff signed interlocutory judgment against the defendant according to form 146, and set the cause down for assessment of damages at the sittings of the High Court.

Held, that there being nothing to shew that the action was brought under R.S.O. c. 68, s. 5, it must be treated as an ordinary action of slander; Rule 578 therefore applied to the case; the delivery of a statement of claim was unnecessary; and the plaintiff had the right to sign interlocutory judgment and have the damages assessed as he proposed.

R. S. Robertson, for plaintiff. R. T. Harding, for defendant.

Province of British Columbia.

SUPREME COURT.

Full Court.] IRON MASK v. CENTRE STAR. [Nov. 22, 1899.
Practice—Trial—Costs on adjournment of.

Appeal by plaintiff to the Full Court from an order of WALKEM, J., pronounced 28th April, 1899, whereby the defendant Company was allowed to continue the sinking of the winze within the boundaries of the mineral claim of the plaintiff company, and from a further order of WALKEM, J., pronounced April 29, 1899, ordering the plaintiff to pay the cost of the adjournment of the trial and in addition thereto all outlay and expenditure of the defendant company connected therewith, the words of the order

being: "And it is further ordered that all disbursements, expense and outlay of every kind (including costs) occasioned to the defendants by the said adjournment be costs to the defendants in any event of the cause; the intention being that the plaintiffs shall reimburse the defendants for and indemnify them against any and all loss that they may suffer by reason of the said adjournment." The defendant applied for leave to inspect the mining workings and premises in question and to do certain experimental work for the purpose of obtaining full information and evidence requisite for the trial but the application was refused, and an appeal from the refusal was dismissed by the Full Court in December, 1898.

The trial afterwards been begun before WALKER, J., at Rossland, and, it appearing to the learned judge's satisfaction after some evidence had been taken, that the inspection previously asked for was then proper, he made an order accordingly upon the defendant's application. The plaintiff then asked for an adjournment of the trial on the ground that it would be necessary for the plaintiff to do certain work in order to preclude the evidence which the defendant expected to derive from the inspection from being evidence, or at all events being conclusive evidence of the continuity of the vein. The application for the adjournment was resisted by counsel for the defendant on the grounds, first, of the great expense, stated to be over \$40,000.00, that it would occasion and, second, on the ground of the danger that the adjournment would prevent the defendant having the benefit of the attendance of certain witnesses, eminent mining engineers, whose presence it was unlikely could be procured at an adjourned trial. The learned trial judge granted the adjournment but ordered that the costs occasioned by it should be costs to the defendant in any event. The plaintiff appealed from both orders.

Held, that the order as to costs should be varied so that the costs should abide the result of the issues to which the inspection related. *Forester v. Farquhar* (1893) 1 Q.B. 564, followed. Costs of the appeal to be costs in the cause.

Bodwell, Q.C. (*MacNeill*, Q.C., with him), for appellant. *Davis*, Q.C. (*Galt*, with him), for respondent.

INTERCOLONIAL RAILWAY.—The following letter from a prominent citizen speaking of the excellent service and courteous treatment on the I.C.R. has been received by the General Passenger Agent:

"A number of our party who attended the Dominion W.C.T.U. Convention feel that we should at least write and tell you how very much we all enjoyed the trip to Halifax by the I.C.R. Personally speaking I have been travelling for many years but never remember a line so smooth, drawing-room cars so comfortable, officials so extremely courteous, and meals so beautifully served and well prepared as by your line. We are grateful for the low rates you kindly gave us. Rest assured that we will always put in a good word for the I. C. Railway. Thanking you for the courtesy and kindness shown to these delegates en route to, and return, from Halifax."

COUNTY OF YORK LAW ASSOCIATION.

The annual meeting was held on the 29th of January last, when the fourteenth annual report of the trustees was received and discussed.

This report states that out of 598 solicitors residing in Toronto, only 306 are members of the Association, of whom twenty-seven have not paid their fees for the past year. Attention was called to the fact that not only is there a thoroughly serviceable working library, but that the aim of the Association has been to promote useful reforms in legislation and practice. The Board also speak of their efforts to procure proper accommodation in the new Court House, and to the removal of the library there when proper accommodation shall have been provided.

The report also alludes to a meeting of delegates from the various County Library Associations, where the following requests were made to the Benchers of the Law Society : (1) To permit the members of the various County Associations to deduct from the annual fee payable to the Society, the sum payable by each member to their respective Associations to the extent of \$5.00 (2) To procure the Dominion and Ontario statutes for the profession and arrange for the publication of a work on practice. (3) To devise a scheme for making the Law School self-supporting. It was reported that as to the first the Benchers had stated that the funds of the Law Society did not permit any such reduction. As to the second that the statutes could be had by the addition of \$2.00 to the annual fees, but that no arrangement could be made for the publication of a work on practice. As to the third that it was intended to increase the yearly fees payable by students, which it was hoped would place the Law School on a self-supporting basis.

The Board of Trustees called the attention of the members to the unsatisfactory condition of things as to appeals to the Court of Appeal, in that so large a portion of the time of the Court was spent in hearing appeals from Judges sitting in single Courts or at assizes or non-jury sittings, that appeals from the Divisional Courts were sometimes not heard at all during the sittings, and that much more work was imposed upon the Court than it could deal with ; and it was suggested that during the present year amendments should be considered and submitted to the proper authorities for adoption.

HAMILTON LAW ASSOCIATION.

The twentieth annual report of the above Association, being for the year 1899, was presented at the recent annual meeting.

The report calls attention to the satisfactory condition of the Library, and to some important additions thereto during the past year. Also to the thorough renovation of the premises of the Association for the convenience of the members. It concludes by recognizing the assistance of the Ontario Government in the past to County Libraries, but suggesting that a change should be made in the basis of distribution of the Government grant by fixing a minimum amount for each Association, to be increased in proportion to the amount contributed by each member thereof. Seventy-one members were reported as having paid their subscriptions for the past year.

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As we go to press we learn that Mr. J. J. Kingsmill, Q.C., Judge of the County Court of the County of Bruce from 1866 to 1893, died on the voyage to Europe. This announcement will bring sorrow to a large circle of friends.

Whilst quite unable to see any connection between legal matters and recent successes in South Africa, we do know that amongst the most loyal subjects of Her Most Gracious Majesty are the members of the legal profession. We therefore make no apology for joining in the rejoicings of the Anglo-Saxon world over the capitulation of Paardeburg and the relief of Ladysmith, this day announced.

It is with much regret that we record the recent death of His Honour Edmund John Senkler, Judge of the County Court of the County of Lincoln. He was at the time at Winnipeg, acting as Chairman of a Royal Commission. Mr. Senkler was born in England on January 29th, 1835, being the son of the Rev. E. J. Senkler, who came to Canada in 1843, and was for some time rector of the High School, Quebec. He was called to the Bar in 1860, and practiced his profession in the town of Brockville. In 1863 he was appointed County Attorney for Leeds and Grenville, made a Q.C. by the Ontario Government in 1876, and elected as a bencher of the Law Society in 1877. In the same year he was appointed County Judge of the County of Lincoln, which position he occupied up to the time of his death. He was a member of several government commissions, the utmost confidence being reposed in his integrity and capacity. The late judge was a man of sound judgment as well as of great learning, and was held in the highest esteem by all the members of the Bar who practiced before him. He was the soul of honour, and, whilst fearless in the discharge of his duties, was always kind and considerate. His death will be felt as a distinct loss to the profession and to the public.

A correspondent who has large experience in matters of practice, thus takes exception to the Ontario Rules of Court recently promulgated, and which appear in another place: "We were in hopes

that the process of tinkering the Rules might be considered as definitely abandoned, but it seems it has not, and a new batch of verbal amendments, the necessity of which is not very obvious, has been passed. Could not all practical purposes have been as well served by the Court issuing direction to its officers?"

The recent decision of the Court of Appeal in *Allcroft v. Morrison*, noted ante p. 98, affords a very complete vindication of the justice of our remarks made in June last, (see ante vol. 35, pp. 402-3) touching the injustice which may result from a Divisional Court being composed of two instead of three judges. We there referred to the cases of *Denier v. Marks* and *Earle v. Marks*, which had been recently disposed of by a Divisional Court of two judges, one of whom though agreeing in the decision did so doubtingly. It now turns out that the judge who doubted was justified in his doubts; and the decision then rendered is now overruled, but the fact remains that in two cases in which, according to law, the defendants were entitled to get security for costs from the plaintiff, they were denied their rights, and this, very probably, owing to the Court being composed of only two judges, and not only were they denied their rights, but were ordered to pay the costs of the attempt to vindicate them.

While on the subject, we may point out, that out of three practice cases recently appealed to the Court of Appeal from Divisional Courts, two of the appeals were successful, which would seem to show that to constitute the Divisional Courts final courts of appeal on questions of practice would not be very satisfactory, one of these decisions, *Allcroft v. Morrison*, we have already referred to, the other *In re Confederation Life and Cordingley*, was on a question of interpleader practice, and in both cases the decision of the Court of Appeal appears to be preferable to that of the Divisional Court.

Nothing is needed in these days to emphasize the drawing together of the component parts of the great and world-wide empire of which we form a part. During the past few days the life blood of a number of those who left this Dominion to fight for Queen and country has been shed to cement a union which cannot but make

for the benefit of mankind at large. But even in the peaceful things and the administration of law (which it is our province more particularly to refer to) we see interesting evidences of the gradual unification of the various races and systems of law which are to be found under the protection of the Union Jack. Amongst our exchanges we have legal periodicals from the four continents and from the islands of the Southern Ocean, showing how the English language and English law is overspreading the earth. Amongst these exchanges we have recently received a number of the *Kathiawar Law Reports*, containing "the decisions of the original and appellate cases of the Chief Court of Civil and Criminal Justice in Kathiawar, and the decisions of the political cases, and the appellate decisions of the Bombay Government on these and on the Rajasthanik Court decisions." These reports are published with the permission of the Political Agent by Ganeshji Jethabhai, Kathiawar Agency Pleader, and appear monthly in the English and Gujarati languages. It is interesting to note that, whilst the judges are English, the counsel or agents engaged are natives. For example, in the Court of the Deputy Assistant Jhallawad, before C. A. Kincaid, Esq., I.C.S., appeared Mr. Harakchand Hemsî as counsel for the appellant, Shah Natha Virji of Khodu, and Gulalrai Vajeshankar as counsel for the respondent, Shah Devjee Gokal of Gokal Ladhu. Amongst the advertisements appears somewhat suggestively that of the *Encyclopædia Britannica*. The inevitable bicycle also comes to the front in the same connection, Vatcha Bros. publishing their advertisement thereof in two languages. Advertisements of talking machines, phosphates, etc., etc., add their quota to the general make up.

NEW SHARES AND BONUSES—CAPITAL OR INCOME.

The statutes which in later years in England and her colonies have authorized the investment of trust funds in the stock or shares of commercial companies have created not a few new dangers in the position of a trustee. One of these is very clearly indicated in the cases of which this article proposes to treat. The question is shortly this,—for whose benefit does a trustee hold bonus dividends or new shares in a company allotted to him as one of the former shareholders, if the instrument of trust contains no specific direction on the subject? Are such bonuses and the

right to the new shares or either of them in the nature of profits resulting from the operations of the concern, to be applied therefore as income for the benefit of the life tenants of the fund, or are they an accretion to the capital of the trust to be invested for the benefit of all?

The question is one of obvious importance to the trustee as he will be personally liable to make good to any of his cestuis que trustent any loss they may sustain in consequence of his decision.

It is important firstly to distinguish a mere bonus or extra dividend from such a privilege as the right to subscribe for new shares. A special increased dividend following upon unusual prosperity whether declared simply as dividend or in the form of a bonus is in the great majority of cases a profit resulting from the original shares and has been held in most instances, as we shall see, to be income in the hands of the trustee, applicable for the benefit of the life tenant alone. Should a company, however, decide for any reason to increase its capital by the issue of more stock the right to take up the new shares is not necessarily a profit at all. It may indeed be no benefit to the original shareholders as if the new stock is issued at a price equal to the market price of the old shares, or if in consequence of the new issue the price of old shares depreciates in the market. Even, however, if the new shares are offered to the old shareholders at a less price than the market value so as to make it obviously in their interest to take them up, it is nevertheless not an easy matter to decide whether the benefit thus accruing is a profit on the original investment or an additional outlay of capital by the subscribers for new shares.

Some confusion arises moreover from the frequent practice amongst companies of issuing new shares at the same time that a bonus is declared and setting off the bonus payable to each shareholder against the price of the new shares allotted to him. It will be well therefore to take the two questions up together as the authorities in almost all cases will be found to deal with both.

The first decision to be considered is *Brander v. Brander* (1799) 4 Ves. 800, which Lord Herschell in *Bouch v. Sproule* speaks of as the earliest case on this question. The Bank of England, having paid out of its surplus funds for the public service £1,000,000, received from the Government £1,125,000 five per cent. annuities, which it directed to be distributed amongst its stockholders in

proportion to the amount of stock held by them. The Bank had a capital limited by statute which it was not authorized to increase. Lord Chancellor Rosslyn held that the annuities so distributed were capital money in the hands of the stockholders and that the dividends upon them alone were to be paid to the life-tenants. The principle upon which this case was decided, as stated by Lord Herschell, in *Bouch v. Sproule*, was that the accumulated profits paid to the Government had become part of the floating capital of the bank, and consequently the annuities received in return were capital money in the bank's hands.

The next case is a decision of the House of Lords *Irvine v. Houstoun* (1803) 4 Paton, Sc. App. 521, in which stock in the Bank of Scotland was in question. Lord Eldon puts the point for decision thus :—"The case therefore comes to be purely that of a tenant for life and of those interested in remainder in the stock in question ; and the point for our decision is which of these parties should be entitled to an extraordinary dividend declared by the bank . . . which is known in both countries by the name of a bonus." As in the case of *Brander v. Brander* the bank in this case was not authorized to increase its capital but had been in the habit of investing its surplus profit annually in exchequer bills and other readily convertible securities which became in this way part of its actual capital fund spoken of in the judgment as its "floating capital." Speaking of this floating capital Lord Eldon says :—"Every person who buys bank stock is aware of this, and if he gives the life interest of his estate to any one it can scarcely be his meaning that the liferenter should run away with a bonus that may have been accumulating on the floating capital for half a century." And he declared the bonus to be capital. These two cases were followed in *Paris v. Paris* (1804) 10 Ves. 185, where the bonus was paid in money and not in stock, as in the earlier cases, and was also shewn to have been earned during the lifetime of the testator ; Lord Eldon holding these circumstances to be insufficient to distinguish it.

The next case is *Witts v. Steere* (1807) 13 Ves. 363, where a bonus dividend was again declared to be capital. Lord Erskine however expressed the opinion that if instead of declaring a special bonus, the bank had merely increased its ordinary dividend there would have been nothing to shew that the whole was not the ordinary fruit of the stock and therefore income for the life tenant. This

was exactly what happened in the next case for consideration which was decided in the same year: *Barclay v. Wainewright*, 14 Ves. 66. Here the dividend had been increased gradually from $2\frac{3}{4}$ per cent. to $3\frac{1}{2}$ per cent. at which rate it continued till 1807 with variations by occasional bonuses making it sometimes as much as $8\frac{1}{2}$ per cent. In that year the regular dividend was suddenly increased to 5 per cent. no part thereof being declared to be bonus or special dividend. Lord Eldon gave the whole to the tenant for life leaving it open, however, apparently, to any one interested to shew by affirmative evidence that any part of it was paid out of the accumulated capital of the bank and was for this reason to be itself treated as capital. The view favouring the life tenant was carried one step further in *Preston v. Melville* (1848) 16 Sim. 163, where a bank declared its ordinary and also a bonus dividend "out of interest and profits" but included both dividends in one dividend warrant. On the authority of *Barclay v. Wainewright* the whole was given to the life tenant.

In re E. Barton's Trust (1868) L.R. 5 Eq. 238, a new aspect was given to the question. In this case a company directed that of "the net earnings during the half-year" a portion should be applied to necessary works and new shares issued to represent the money so applied and that the balance of the earnings should be paid out as dividend. Vice-Chancellor Sir W. Page Wood determined that the company had the right to say whether their profits should be paid out as income or go in augmentation of capital, and held that the new shares in this case being a capitalization of profits by the company were themselves capital. He says: "The dividend to which a tenant for life is entitled is the dividend which the company chooses to declare."

We now come to what may be called the leading case on this question, *Bouch v. Sproule* (1887) 12 A.C. 385, where all the prior authorities are reviewed. The company whose transactions were here in question had power to increase its capital, and had also power before declaring a dividend to set apart out of profits a sum sufficient to meet contingencies, repairs, etc. Having created a large reserve fund under this provision they divided it amongst the shareholders as a bonus dividend. At the same time it was resolved "that the company's operations render it desirable to raise an amount (equal to the gross amount of the bonus) as capital account" and it was proposed to issue new shares to each

former holder in such a proportion that the bonus on the old shares would just pay the price of the new shares. The actual facts were that the whole amount of the accumulated profits had been expended in new plant and the intention was to capitalize this outlay by the issue of new shares against it, declare the profits as bonus and then set off the bonus against the price of the new shares.

Fry, L.J., in his judgment in the Divisional Court, L.R. 29 C. D. 653, lays down the test as to when new shares created out of accumulated profits are income and when capital. "When a testator or settlor directs or permits the subject of his disposition to remain as shares or stock in a company which has the power either of distributing its profits as dividend or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under him, the testator or settler in the shares, and consequently what is paid by the company as dividend goes to the tenant for life and what is paid by the company to the shareholder as capital or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital. In a word what the company says is income shall be income and what it says is capital shall be capital."

Lord Herschell quotes this statement of the law with approval in his judgment in the House of Lords and draws a clear distinction between companies which can, and companies which cannot, increase their capital, in the following words:—"And it appears to me that where a company has power to increase its capital and to appropriate its profits to such increase, it cannot be considered as having converted any part of its profits into capital when it has made no such increase even if a company having no power to increase its capital may be regarded as having thus converted profits into capital by the accumulation and use of them as such." He then goes on to hold that if a company having power to increase its capital declares a bonus out of accumulated profits without declaring such bonus to be capital it will remain income.

Lord Watson referring to this question says that where, as in this case "the company has power to determine whether profits reserved and temporarily devoted to capital purposes shall be distributed as dividend or permanently added to its capital the interest of the life tenant depends in my opinion upon the decision of the company."

The intention of the company was thus made the crucial test in all cases where such company is authorized to increase its capital. Taking this as the criterion in this case the Court held that looking at all the circumstances the real nature of the transaction was that the company did not pay or intend to pay any sum as dividend but intended to and did appropriate the undivided profits as an increase of the capital stock, that the bonus dividend was therefore capital of the testator's estate and that the life tenant was not entitled to the bonus or the new shares. *Irvine v. Houstoun* and the cases which follow it are therefore now limited to companies which have no power to increase their capital, and the profits of such companies if accumulated and used as capital become for this purpose at least part of the capital of the concern and a subsequent division of them as a bonus or otherwise is not sufficient to make them income. The simple case of the issue of new shares uncomplicated by the contemporaneous declaration of a bonus cannot of course arise in the case of companies not authorized to increase their capital and to which the decision of *Irvine v. Houstoun* applies.

In the case of companies authorized to increase their capital, however, we have still to consider whether new shares issued without reference to any bonus are capital or income. This point had been dealt with many years before in *Rowley v. Unwin* (1855) reported shortly in 2 K. & J. at p. 138. New shares were allotted to trustees of a marriage settlement in respect of their former holding, the calls upon which were paid by the trustees out of the income of the life tenant. The trustees then sold the new shares and invested the proceeds. Vice Chancellor Sir W. Page Wood held that the new shares were capital of the trust and that the tenant for life had only a charge on the proceeds for the amount of the calls paid out of her income. He compared the case to that of a tenant for life renewing leasehold property and advancing money for the fine due on the renewal.

The last decision for consideration is that of *Re Malam* (1894) 3 Ch. 578 where *Bouch v. Sproule* and *Rowley v. Unwin* were followed and the rules of law laid down in these cases quoted and approved. The company whose shares were in question was a most prosperous one and had been paying the astonishing dividend of 50 per cent. as appears by the report. In 1893 this dividend was increased to 100 per cent. The directors at the same time decided to issue new shares to raise a fund for certain capital expenditures,

and for convenience allotted them, at the same time that the dividend was declared, the amount called upon the new shares being covered by one-half of the increased dividend declared on the old shares. Sterling, J., says:—"I do not think that it was intended to capitalize any existing assets of the company under the guise of first declaring a dividend and then issuing new shares to the existing shareholders and I think the object was to give any share holder who might desire it an opportunity of increasing his holding in the company (this being a benefit) and to do so in a way which would at once secure to the company the desired increase of capital without putting the shareholders under an obligation to find the money out of their own pockets . . . the conclusion at which I arrive on the question of fact is that the company by the resolutions . . . did really intend to distribute its accumulated profits as dividend to the extent to which those resolutions purported to sanction such a division. In my opinion, therefore, the tenant for life was on the principle laid down in *Bouch v. Sproule* entitled to the dividend declared by these resolutions. . . . If an offer were made to the trustees unconnected with the payment of any dividend the option would have to be exercised on behalf of all the beneficiaries, and if the instrument creating the trust did not authorize the retention of the shares it would be the duty of the trustees to sell them and deal with the proceeds as capital ; and, in fact, such a course has been repeatedly authorized by the Court." The shares taken up by the executors in this case having been sold the Court held that the life tenants were entitled to the full amount of the dividend out of the proceeds of the sale of the new shares, the balance of such proceeds being capital.

The result of the cases may be summarized as follows : In the case of companies with a capital stock limited by law a bonus or special dividend out of the accumulated profits of the company which have been held and used by the concern as part of its working capital is capital and so remains in the hands of the shareholders. In the case of companies authorized by law to increase their capital stock what is declared by them as dividend is income for the old shareholders, but any capitalization of profits by the company, whatever form it may take, is binding on all the holders of stock and enures to the benefit of all persons interested in such

stock. New shares issued by such companies unconnected with any distribution of profits are capital in the hands of the former shareholders to whom they are allotted.

Toronto.

W. MARTIN GRIFFIN.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act.)

HUSBAND AND WIFE—SEPARATION DEED—INTERCOURSE WHILE LIVING APART—EVIDENCE OF.

In *Rowell v. Rowell* (1900) 1 Q.B. 9, the action was brought by a wife against her husband to recover arrears of weekly payments due under a separation deed. The defendant set up that the deed had been put an end to by the plaintiff's subsequent return to cohabitation with the defendant, and that having once been put an end to, it was absolutely at an end. The only evidence in support of this defence was the fact that the plaintiff, in the middle of 1897, yielded to the defendant's solicitations, and submitted to acts of intercourse on three or four occasions, whilst living apart from him; that the parties thereafter continued to live apart, and the payments were continued by the defendant, under the deed, up to January, 1898, and that neither party understood or intended by such acts of intercourse that cohabitation should be resumed. Grantham, J., who tried the action, gave judgment for the plaintiff, and the Court of Appeal (Lord Russell, C.J., and Smith and Williams, L.JJ.,) affirmed his decision, Lord Russell, however, expresses some hesitation, which does not appear to have been shared by the other members of the Court.

MALICIOUS PROSECUTION—CORPORATION, LIABILITY OF, TO ACTION FOR MALICIOUS PROSECUTION.

Cornford v. Carlton Bank (1900) 1 Q.B. 22, is reported, we presume, for the purpose of shewing that notwithstanding that Lord Bramwell said in the House of Lords, in *Abroth v. N.E. Ry. Co.*, 11 App. Cas. 247, "I am of opinion that no action for a malicious prosecution will lie against a corporation," the general consensus

of opinion of the Bench and the Bar is, that it will. The point was raised at the trial before Darling, J., (1899) 1 Q.B. 392 (noted ante vol. 35, p. 301), but was abandoned before the Court of Appeal.

LANDLORD AND TENANT—NOTICE TO QUIT—YEARLY TENANCY—"END OF THE CURRENT YEAR."

Wride v. Dyer (1900) 1 Q.B. 23, was a case stated by justices on an application by a landlord to recover possession of the premises against an overholding tenant. The case turns on the sufficiency of a notice to quit. The tenant held on a yearly tenancy from Lady Day to Lady Day. On 24th March, 1898, the landlord gave notice to quit "on 24th June, 1898, or at end of your current year's tenancy." It was contended by the tenant that this was either a three months' notice to quit on 24th June, 1898, which was not the end of a year of the tenancy, or else a one day's notice to quit on 25th March, 1898, which day, it was claimed, was the end of the year's tenancy current when the notice was given. Ridley and Darling, JJ., thought that the reasonable construction to be placed on the notice was that it was a notice to quit on the 24th June, 1898, or the 25th March, 1899, and was therefore sufficient. The Court preferred to follow *Doe v. Culliford*, 4 D. & R. 248, and *Doe v. Smith*, 5 A. & E. 350, notwithstanding that in *Doe v. Morphett*, 7 Q.B. 577, *Doe v. Culliford* was declared to be "bad law."

TROVER—JOINT TORT FEASORS—COMPROMISE OF ACTION AGAINST ONE OF TWO TORT FEASORS—MONEY HAD AND RECEIVED, ACTION FOR—WAIVER—ACCEPTANCE OF PART OF PROCEEDS OF SALE.

Rice v. Reed (1900) 1 Q.B. 54, was an action to recover damages for the tortious conversion of the plaintiff's goods. The facts were somewhat peculiar. A person named Soltau, formerly in the plaintiff's employment, had wrongfully sold a large quantity of the plaintiff's sawdust to the defendant Reed. The plaintiff, having discovered that Soltau had deposited £1,500, part of the proceeds, in a bank to his own credit, commenced an action against him for the wrongful conversion of the sawdust, and in the alternative for the payment of the £1,500 as money had and received to the plaintiff's use. In that action the plaintiff obtained an injunction against the withdrawal of the £1,500 until the trial, and the action was ultimately compromised on the terms that £1,125 out of the £1,500 should be paid to the plaintiff in settlement of his claim

against Soltau, but without prejudice to the plaintiff's claim against Reed. The defendant Reed contended that this amounted to an election on the part of the plaintiff to waive the tort and adopt the sale, and was a bar to the present action. The jury found as a fact that the defendant Reed knew that Soltau was dealing with the sawdust in an improper manner, and Lawrance, J., who tried the action, gave judgment for the plaintiff for the damages he had sustained over and above the amount received from Soltau, and this judgment was affirmed by the Court of Appeal (Lord Russell, C.J., and Smith, and Williams, L.JJ.), that Court holding that although if the plaintiff had taken judgment in his action against Soltan upon the claim for money had and received, that would have been a conclusive election on his part to waive the tort, yet that the compromise which had been made had not that effect, and that the plaintiff's express reservation of his rights against Reed was effectual.

**RAILWAY—SPEED OF TRAINS—BREACH BY COMPANY OF STATUTORY PROVISION
—INFORMATION—INJUNCTION—EVIDENCE OF INJURY TO PUBLIC.**

Attorney-General v. London & North Western Ry. Co. (1900) 1 Q.B. 78, was an action in the nature of an information against the defendant company, for an injunction restraining them from committing a breach of a statutory provision regulating the speed at which they should run their trains over a level crossing. The injunction was granted by Bruce, J., and the only point argued on the appeal from his decision, was that the Court had a discretion to grant or refuse the injunction, and that as there was no evidence of any injury having been occasioned to the public by the defendants' breach of the statutory provision in question, the injunction ought not to have been granted. The Court of Appeal (Smith, Collins and Williams, L.JJ.), however, was of opinion that, when an information is filed by the Attorney-General to enforce the express provisions of an Act of Parliament made in the interests of the public, the Court cannot go into the question whether the breach of such provisions is, or is not, an injury to the public, and is bound to grant the injunction, and the judgment of Bruce, J., was unanimously affirmed.

**COMPANY—MONEY PAID ULTRA VIRES BY DIRECTORS TO SHAREHOLDERS—
LIABILITY OF DIRECTORS TO REPLACE MONEY PAID ULTRA VIRES—INDEMNITY.**

In *Moxham v. Grant* (1900) 1 Q.B. 88, the Court of Appeal

(Smith, Collins and Williams, L.JJ.,) have affirmed the judgment of the Divisional Court (1899) 1 Q.B. 480 (noted ante vol. 35, p. 375). The facts were that the plaintiffs, the directors of a limited company, had, without authority, paid back to the defendant and other shareholders part of the capital, with the knowledge and consent of such shareholders. Subsequently, in liquidation proceedings, the directors had been compelled to replace the money so paid, and the present action was brought to compel the defendant to pay back the amount he had been improperly paid. The Divisional Court based their decision on the ground that the plaintiffs and defendant stood in the position of trustees and cestui que trust, and that it was a case of breach of trust with the assent of the cestui que trust, and the latter was, therefore, bound to indemnify his trustees. Smith, L.J., however, bases his decision on the ground that by the payment the defendant became a constructive trustee of the money for the company, and it was, therefore a case of two trustees in pari delicto, and that the plaintiffs, having been compelled to make good the breach of trust, were entitled to contribution from the other trustees. Collins and Williams, L.JJ., on the other hand, consider that as the liquidator might have recovered the money direct from the shareholders, the payment made by the plaintiffs was in ease of the defendant, and on that ground was recoverable. All agree that the rule as to there being no contribution or indemnity as between joint tort feors had no application.

LANDLORD AND TENANT — DISTRESS — GOODS DISTRAINED, IMPOUNDED ON DEMISED PREMISES — 11 GEO. 2, C. 19, S. 10 — MAN IN POSSESSION — POUND-BREACH.

Jones v. Biernstein (1900) 1 Q.B. 100, is the case reported (1899) 1 Q.B. 470 (noted ante vol. 35, p. 374). The short point was, Whether, when goods distrained for rent are impounded on the demised premises, it is necessary that the bailiff should remain continuously on the premises, or whether his temporarily leaving the premises amounts to an abandonment of the distress? The Divisional Court decided both questions in the negative, and the Court of Appeal (Smith, Collins and Williams, L.JJ.,) have affirmed that decision. On the appeal, the defendant attempted to argue that there had been no impounding of the goods, but the Court of Appeal refused to consider that point, as the leave to appeal granted by the Divisional Court was limited to the other point.

LANDLORD AND TENANT—LEASE TO TRUSTEE—COVENANT BY LESSEE IN TRUST TO REPAIR—OCCUPATION OF DEMISED PREMISES BY CESTUI QUE TRUST—CESTUI QUE TRUST, LIABILITY OF, FOR BREACH OF TRUSTEE'S COVENANT.

Ramage v. Womack (1900) 1 Q.B. 116, was an action brought by a landlord who had leased certain premises to a trustee, who had entered into a covenant to repair, to recover damages for breach of this covenant from the cestui que trust who had been in the actual occupation and enjoyment of the premises. The preliminary question of law, as to whether there was any liability, was tried without pleadings by Wright, J., who held that the defendant was under no liability, legal or equitable, to the plaintiff under the covenant made by her trustee, and he dismissed the action.

FRAUD—FALSE REPRESENTATION—TESTIMONIALS, IMPROPER USE OF—INJUNCTION.

Tallerman v. Dowsing Radiant Heat Co. (1900) 1 Ch. 1, is an action to restrain the defendant company from printing or publishing circulars containing any press notice written in favour of the plaintiff's business, so as to suggest or lead to the belief that such notice referred to the defendant's business. The facts were as follows: The plaintiff had invented a system of treating diseases by the local application of hot air, and there appeared in a medical paper a favourable account of this system, with particulars of its application to certain uses. The defendant was the inventor of a rival system of hot air treatment, and circulated among the patients of the plaintiff a pamphlet for the purpose of advertising the defendant's system, in which were inserted extracts from articles written by certain physicians in reference to the plaintiff's system which had been published by *The Lancet*, but which extracts omitted anything to shew that they in fact related to the plaintiff's system; and the extracts were so made that a reader would infer that they related to the defendant's system. There was evidence that some of the plaintiff's patients had been misled by these extracts, but there was no evidence of any actual damage to the plaintiff. Stirling, J., was of opinion that, as it was admitted there had not been any attempt by the defendants to pass off his system as that of the plaintiff's, there was no ground for granting an interlocutory injunction, although he conceded that the plaintiff had reason to complain of the defendants' action. An appeal was taken from this decision, and it was agreed that it should be treated

as an appeal from a judgment for the defendants at the trial, but the appeal was not heard, but on the defendants giving a perpetual undertaking not to print matter originally written in favour of the plaintiff's system of heating, it was ordered that the defendant should pay the plaintiff £25 costs, and further proceedings in the action were stayed. It would almost seem, therefore, that the defendant had not much confidence in being able to maintain the decision of Stirling, J.

MUNICIPAL LAW—VALIDITY OF BY-LAW.

Thomas v. Sutters (1900) 1 Ch. 10, was an action brought for the dissolution of a partnership and for taking of the partnership accounts. The defence was that the principal business of the partnership was the carrying on of betting in streets and public places in the City of London, and that by a by-law of the County Council it was provided that "no person shall frequent and use any street or other public place, on behalf either of himself or any other person, for the purpose of bookmaking or betting, or wagering, or agreeing to bet a wager with any person, or paying or receiving or settling bets," and that consequently the partnership business was illegal, and the plaintiff had no right of action. The plaintiff contested the validity of the by-law. The by-law was made by the Council in pursuance of a statute enabling it to make by-laws for the "good rule and government" of the county. Kekewich, J., following *White v. Morley* (1899) 2 Q.B. 34, held the by-law to be valid, and his decision was affirmed by the Court of Appeal (Lindley, M.R., Jeune, P.P.D., and Romer, L.J.), and the fact that there was a statute expressly dealing with betting on streets, was held to afford no objection to the by-law, the object of the Act in question being to regulate the traffic in the streets, and the by-law in question was not repugnant to it in any way.

STATUTE OF LIMITATIONS—POSSESSORY TITLE—ACTUAL VISIBLE POSSESSION—CONSTRUCTIVE POSSESSION—ERECTION OF GATES—EQUIVOCAL ACTS OF POSSESSION—3 & 4 Wm. 4, c. 27, s. 3—(R.S.O. c. 133, s. 5).

Littledale v. Liverpool College (1900) 1 Ch. 19, is a case which illustrates the rule that an adverse possession of land sufficient to give a title under the Statute of Limitations, 3 & 4 Wm. 4, c. 27, s. 3 (R.S.O. c. 133, s. 5), must be an actual visible, exclusive and continuous occupation, and that such a title cannot be acquired by

mere equivocal acts of possession. In the present case the contest was as to the ownership of a narrow strip of land lying between two fields owned by the defendants, which strip had been conveyed to the defendants with the fields, but the plaintiffs had a right of way over the strip to a field belonging to them. The strip was originally open at both ends, and the end farthest from the plaintiffs' field communicated with a public highway. More than twelve years before action, the plaintiffs erected a gate on the strip where it adjoined the highway, and a gate was also erected at the other end of the strip, but it was not clear whether it was on the strip or on the plaintiffs' own land. There was no evidence that the plaintiffs had erected the gates with the intention of excluding the defendants from the strip. The present action was brought to restrain the defendants from trespassing on the strip. Bigham, J., tried the action. It is not stated explicitly in the report what judgment he gave, but it may be inferred that he dismissed the action. The Court of Appeal (Lindley, M.R., Jeune, P.P.D., and Romer, L.J.) agreed that the plaintiffs could not succeed. The erection of the gates and keeping them locked so as to exclude every one, it was conceded, would have been a sufficient possession to give the plaintiffs a title under the statute, if the plaintiffs had had no right to, or over, the strip in question; but inasmuch as the plaintiffs had a right of way, the erection of the gates was an equivocal act, and it might be inferred that they were put up merely to protect the plaintiffs' right of way from invasion by the public, and not for the purpose of dispossessing the defendants. When they commenced the action, and for some time before, the plaintiffs only claimed a right of way, and no more; and, on the evidence, the Court was satisfied that the gates were not put up originally with any intention of excluding the defendants. The judges of the Court of Appeal, however, admit that the case was not free from difficulty.

MORTGAGE—POWER OF SALE—SETTING ASIDE SALE UNDER POWER—LACHES.

In *Nutt v. Easton* (1900) 1 Ch. 29, the Court of Appeal (Lindley, M.R., Jeune, P.P.D., and Romer, L.J.) dismissed an appeal of the plaintiff in person from the judgment of Cosens-Hardy, J., (1899) 1 Ch. 873 (noted ante vol. 35, p. 630). The action was brought by a mortgagee to set aside a sale made by the mortgagee to her own solicitor, under a power of sale contained in the

mortgage. The sale was of a reversionary interest, and took place in 1888, and the plaintiff was immediately notified of the sale, and took legal advice, and was informed that the sale might be impeached, but she took no steps until 1897, about eight months after the reversion had fallen into possession. The Court of Appeal, without calling on the defendant, held that the plaintiff was barred by her laches.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.]

BINGHAM *v.* McMURRAY.

[Nov. 29, 1899.

Contract—Sale of patent—Future improvements.

By contract under seal M. agreed to sell to B. and S. the patent for an acetylene gas machine for which he had applied and a caveat had been filed and also all improvements and patents for such machine that he might thereafter make, and covenanted that he would procure patents in Canada and the United States and assign the same to B. & S. The latter received an assignment of the Canadian patent and paid a portion of the purchase money, but when the American patent was issued it was found to contain a variation from the description of the machine in the caveat and they refused to pay the balance, and in an action by M. to recover the same they demanded, by counterclaim, a return of what had been paid on account.

Held, reversing the judgment of the Court of Appeal, that the agreement was not satisfied by an assignment of any patent that M. might afterwards obtain; that he was bound to obtain and assign a patent for the machine described in the caveat referred to in the agreement, and that as the evidence shewed the variation therefrom in the American patent to be most material, and to deprive the purchasers of a feature in the machine which they deemed essential, M. was not entitled to recover.

Held, further, GWYNNE, J., dissenting, that as B. & S. accepted the Canadian patent and paid a portion of the purchase money in consideration thereof, and as they took the benefit of it, worked for their own profit, and sold rights under it, they were not entitled to recover back the money so paid as money had and received by M. to their use. Appeal allowed with costs, and cross-appeal dismissed.

Nesbitt, Q.C., and *Biggar*, for appellant. *W. B. Raymond*, for respondent.

Ont.] RANDALL v. HOME LIFE ASSOCIATION. [Nov. 29, 1899.

Life insurance—Action on policy—Pleading—Condition precedent—Burden of proof—Waiver.

A life insurance policy contained a condition providing for payment in ninety days after satisfactory proofs of death were furnished to the association; another that death from consumption and certain other diseases was not covered by the policy; and another setting out what proofs must be given. In an action on this policy the plaintiff alleged that she had furnished proof of the death of the insured on a certain date, and that all conditions were performed and all times elapsed to entitle her to payment. The defendants denied these allegations and put plaintiff to strict proof thereof.

Held, that under the Ontario Judicature Act, differing in this respect from the practice in England, the plaintiff was bound to prove the truth of the above allegations; that giving of satisfactory proofs was a condition precedent to her right of action, performance of which she had to allege and prove; that no rule of law obliged defendants to prove non-performance; that there was no evidence of waiver of proof as contended by the plaintiff; and that in any case plaintiff could not recover as the proofs given, taken in connection with the evidence, shewed deceased to have died of consumption which was not covered by the policy. Appeal allowed with costs.

Osler, Q.C., and *Hoskin*, Q.C., for appellant. *Watson*, Q.C., and *Lancaster*, for respondent.

Que.] TOWN OF RICHMOND v. LAFONTAINE. [Nov. 29, 1899.

Municipal corporation—Construction of waterworks—Improper construction—Notice—Use of works—Waiver—Mise en demeure—Condition precedent.

A contract for the construction and maintenance of a system of waterworks required them to be completed in a manner satisfactory to the corporation and allowed the contractors thirty days after notice to put the works in satisfactory working order. On the expiration of the time for the completion of the works the corporation served a protest upon the contractors complaining in general terms of the insufficiency and unsatisfactory construction of the works without specifying particular defects, but made use of the works complained of for about nine years when, without further notice, action was brought for the rescission of the contract and forfeiture of the works under conditions in the contract.

Held, that, after the long delay, when the contractors could not be replaced in their original position, the complaint must be deemed to have been waived by acceptance and use of the waterworks, and it would, under the circumstances, be inequitable to rescind the contract.

Held, further, that a notice specifying the particular defects to be remedied was a condition precedent to action and that the protest in general terms was not a sufficient compliance therewith to place the contractors in default. Appeal dismissed with costs.

H. B. Brown, Q.C., and *Lawrence*, for appellant. *Panneton*, Q.C., and *Belcourt*, Q.C., for respondents.

Ont.] DOMINION CONSTRUCTION CO. *v.* GOOD. [Nov. 29, 1899.
Contract — Construction of railway — Certificate of engineer — Condition precedent.

Where the contract for construction of a railway provided that the work was to be done to the satisfaction of the chief engineer of a railway company, not a party to such contract, who was to be the sole and final arbiter of all disputes between the parties, the contractor was not bound by such condition when the party named as arbiter proved to be, in fact, the engineer of the other party to the contract. Appeal dismissed with costs.

D'Arcy Tate, for appellant. *Aylesworth*, Q.C., and *Washington*, for respondent.

Province of Ontario.

COURT OF APPEAL

From Robertson, J.] ROMBOUGH *v.* BALCH. [Jan. 16.
 GREEN *v.* NEW YORK & OTTAWA R.W. Co.

Master and servant—Negligence—Damages—Death of child—Railway—Want of lock at switch.

The omission to have a lock at a railway switch, situate near a much travelled highway, is such negligence as to make those having control of the railway liable in damages for the death of their servants, resulting from the switch becoming misplaced.

A parent cannot recover damages for the death of his child unless there is evidence to justify the conclusion that there is a reasonable expectation of pecuniary benefit to the parent in the future, capable of being estimated. Judgment of ROBERTSON, J., affirmed.

Cassels, Q.C., and *A. W. Anglin*, for appellants. *Aylesworth*, Q.C., and *C. H. Cline*, for respondent Rombough. *G. I. Gogo* and *H. Beattie*, for respondent Green.

From Drainage Referee.]

[Jan. 16.

TOWNSHIPS OF ADELAIDE AND WARWICK *v.* TOWNSHIP OF METCALFE.*Drainage Act—Amendment of engineer's report—Jurisdiction of referee—Appeal—Court of Appeal—R.S.O. c. 226, ss. 89, 90.*

The Drainage Referee cannot, under s. 89 of the Drainage Act, R.S.O. c. 226, upon the admission of the initiating township that the report appealed from is defective, refer it back, against the wishes of the appealing townships, to the engineer for amendment. That course can be adopted, if at all, only with the engineer's consent and upon evidence given. Judgment of the Drainage Referee reversed.

An order assuming to refer back a report is not an interlocutory order within the meaning of s. 90 of the Drainage Act, R.S.O. c. 226, and an appeal lies to the Court of Appeal against it.

Aylesworth, Q.C., for appellants. *J. Folinsbee*, for respondents.

From Robertson, J.]

LAZIER *v.* ROBERTSON.

[Jan. 16.

Settlement—Contingent or vested estate.

Held, affirming the judgment of ROBERTSON, J., 30 O.R. 517, 35 C.L.J. 281 that under the settlement in question the child who died before the period for conveying took a vested interest.

H. W. Mickle, for appellant. *W. H. Blake*, for respondent.

From Street, J.]

[Jan. 16.

IN RE TOWN OF CORNWALL AND CORNWALL WATERWORKS COMPANY.

Municipal corporations—Waterworks company—Arbitration and award—Payment into Court—Interest.

Where a municipal corporation, taking over the works of a waterworks company under the statutory arbitration procedure, wishes to take advantage of the provisions of ss. 445 and 446 of the Municipal Act, it must pay into Court the amount awarded with interest to the date of payment in, and six months' interest in advance. Judgment of STREET, J., 30 O.R. 81, affirmed.

S. H. Blake, Q.C., and *Leitch*, Q.C., for appellants. *Aylesworth*, Q.C., and *C. H. Cline*, for respondents, the waterworks company. *Bruce*, Q.C., for respondents, the mortgagees.

From Rose, J.]

BREWER *v.* CONGER.

[Jan. 16.

Lease—Renewal—Option—Mortgage—Redemption.

Under a covenant in a lease that the lessors would, at the expiration of the term thereby granted, grant another lease, "provided the said lessee

should desire to take a further lease of said premises," no notice or demand by the lessee is necessary. The existence in fact of a desire for the further lease is all that is essential, and that desire may be indicated by conduct and circumstances.

A lease of land, subject to two mortgages, contained a covenant by the lessor and the second mortgagee with the lessee that the lessee might, if he desired to do so, redeem the first mortgage, and that in that case the sum paid for redemption should be a first charge on the land.

Held, that the second mortgagee's right to redeem the first mortgage, after its acquisition by the lessee, was not taken away. Judgment of ROSE, J., affirmed.

Aylesworth, Q.C., for appellant. *Clute*, Q.C., for respondent.

From Meredith, J.]

KIRBY *v.* BANGS.

[Jan. 16.]

Will—Construction—Contingent or vested interest—Legacy.

A testator devised certain property to trustees to hold it in trust for twenty years after his decease, during that time to pay the income to his widow and children, naming them in certain shares; and, after the expiration of twenty years, to sell and to divide the proceeds among his "said children" in certain shares. He also devised certain other property to the trustees, upon trust, to sell from time to time as they in the exercise of "full discretion" should think fit, and to pay the income to his widow for life, and upon her decease to divide the corpus among his children, naming them, in certain shares.

Held, affirming the judgment of MEREDITH, J., that the children took vested interests.

Osler, Q.C., for appellants. *A. J. Boyd*, for official guardian. *W. B. Raymond*, for executors. *Aylesworth*, Q.C., for respondents.

From Boyd, C.] GUTHRIE *v.* CANADIAN PACIFIC R.W. CO.

[Jan. 16.]

Prescription—Right-of-way—Railways—Crossing.

When a line of railway severs a farm, and no crossing is provided by the company, a right-of-way across the line may be acquired by the owner of the farm by prescription.

A farm crossing provided by the railway company may be used by any person who, after the severance, becomes the owner of portions of the farm on both sides of the line of railway, and has a right of access to the crossing.

A right-of-way may be acquired although the dominant tenement is not contiguous to the servient tenement. Judgment of BOYD, C., affirmed.

Wallace Nesbitt, Q.C., and *Angus MacMurchy*, for appellants. *Guthrie*, Q.C., and *Shepley*, Q.C., for respondents.

From MacMahon, J.] COUNTY OF YORK v. ROLLS. \ [Jan. 16.

Water and watercourses—Flood—Change in course of stream.

When, owing to an extraordinary flood, a stream suddenly changes its course and washes away part of the land of a riparian proprietor, he is entitled, at any time before a prescriptive right or right by estoppel to keep the stream in its new channel is acquired against him, to fill in the places washed away and to turn the stream back to its original channel. Judgment of MACMAHON, J., affirmed.

C. C. Robinson, for appellants. William Cook, for respondent Rolls. M. H. Ludwig, for respondent Hunter.

From Armour, C.J.] [Jan. 16.

IN RE CANADIAN PACIFIC R. W. CO. AND CITY OF TORONTO.

Landlord and tenant—Agreement for lease—Covenant to pay taxes—Evidence—Judicial discretion.

Upon a reference to settle the form of a lease, under a contract by a municipal corporation to demise land owned by it to a railway company for a long term of years with perpetual right of renewal, evidence of surrounding circumstances and the practice and usage of conveyancers is admissible to enable the referee to decide whether the lease should contain a covenant by the lessee to pay municipal taxes. Judgment of ARMOUR, C.J., affirmed.

Upon such a reference, the referee is entitled to exercise a judicial discretion as to the evidence to be admitted, and he should not be ordered to admit, subject to objection, all evidence which may be tendered.

Aylesworth, Q.C., Angus MacMurchy and J. Shirley Denison, for appellants. Robinson, Q.C., and Fullerton, Q.C., for respondents.

From Armour, C.J.] BUGBEE v. CLERGUE. [Jan. 16.

Judgment—Foreign judgment—Action in Ontario—Defence available in foreign Court—Principal and surety—Limitation of actions—Statement of claim—Writ of summons—"Absence beyond seas"—Foreigner.

A creditor who has obtained judgment in a foreign country for the amount of his debt may, if entitled to sue at all in this province, sue either upon the foreign judgment or upon the original consideration.

An action upon a foreign judgment must fail if it be proved that the judgment is of such a nature that it would, upon the application of the defendant, be set aside in the Court in which it was recovered.

By the endorsement of his writ, the plaintiff claimed upon the foreign judgment only, but in his statement of claim set up an alternative claim upon the original consideration—a promissory note.

Held, that it was too late to object to this at the trial, and that, as the period of limitation had not expired at the time of the issue of the writ, the plaintiff was entitled to recover, although that period had expired before the filing and delivery of the statement of claim.

Held, also, that even if the action were treated as having been brought at the time of the filing and delivery of the statement of claim, the defence of the Statute of limitations was of no avail because the defendant, a foreigner, had never been within the province, and the statute had therefore never commenced to run in his favour.

In an action against the maker of a promissory note, it was alleged that he was a surety; and it was shewn that, by the law of the State in which the note was given, a creditor could not recover against a surety without first endeavouring by legal process to recover against the principal.

Held, that the defence of suretyship was not made out; but, *semble*, that such a defence would be matter of procedure only, and no bar to an action in this province. Judgment of ARMOUR, C.J., affirmed.

Riddell, Q.C., and *J. D. Falconbridge*, for the appellant. *William Macdonald*, Q.C., for the respondent.

From Boyd, C.]

HAVEN v. HUGHES.

[Jan. 16.

Contract—Mineral rights—Right to possession.

By an agreement made Jan. 13, 1897, in consideration of one dollar, the owner of certain lands agreed "to lease and hereby does lease to the plaintiff the following described premises," mentioning them, and "hereby leases and agrees to give and convey hereby to said plaintiff all mineral rights on said premises, the right to quarry stone and the right to bore for gas, with privilege to erect and bring on to said premises all necessary tools, machinery and conveniences for mining, quarrying and boring on said premises, and to erect buildings thereon for said tools and machinery and for housing employees, and also to drain said premises, and to build necessary railroad thereon." "Said plaintiff also agrees, if he uses said property under this agreement, to take therefrom the amount of 50,000 cords of stone, and to pay therefor the sum of 25 cents per cord per United States specifications. Said owner hereby agrees that he will give no other party or corporation any rights on said premises for the above-described purposes on or before August 1st, 1897." "Unless said plaintiff utilizes said premises for said purposes on or before August 1st, 1897, this lease shall be null and void."

Held, affirming the judgment of Boyd, C., that under this agreement the plaintiff was not entitled to exclusive possession of the land, or to quarry all the stone thereon, but only to quarry 50,000 cords.

Aylesworth, Q.C., and *C. A. Moss*, for appellant. *Osler*, Q.C., and *W. M. German*, for respondents.

From Board of County Judges.]

[Jan. 16.

IN RE LONDON STREET RAILWAY ASSESSMENT.

Assessment and taxes—Street railway—Rails, poles and wires—Bridges—Road-bed—Adding items on appeal.

Although a street railway is operated as a continuous system through all the wards of a city, the portion of the rails, poles and wires, in each ward, must be assessed in that ward, and in making the assessment the rails, poles and wires must be treated as so much dead material, and not as necessary portions of a going concern.

Bridges built and used by a street railway as part of their system are subject to assessment, but must be assessed in the same way as the rails, poles and wires.

Consumers' Gas Co. v. Toronto (1897) 27 S.C.R. 453; *In re Bell Telephone Company Assessment* (1898) 25 A.R. 351; and *In re Toronto Railway Company Assessment* (1898) 25 A.R. 135, applied.

Upon an appeal to the Board of County Judges from the Court of Revision coming on for hearing, the Board, at the request of the city, and without any previous notice or assessment or application to the Court of Revision, added to the items of assessable property of a railway company, a certain amount as the value of the portion of the streets of the city "occupied" by the company.

Held, that the Board of County Judges had no jurisdiction to make this addition, the amendment made by s. 5 of 62 Vict., c. 27 (O), not then being in force.

Seem, the railway company was not liable to assessment in respect of the portions of the streets occupied by them. Judgment of the Board of County Judges reversed.

I. F. Hellmuth, for appellants. *T. G. Meredith*, for respondents.

From Divisional Court.]

RICE v. RICE.

[Jan. 25.

Fraudulent conveyance—Husband and wife—Income—Gift.

An appeal by the defendants from the judgment of a Divisional Court [ARMOUR, C.J., FALCONBRIDGE and STREET, JJ.] was argued before OSLER, MACLENNAN, MOSS and LISTER, JJ. A., and FERGUSON, J., on Jan. 24, 1900, and on Jan. 25, 1900, was dismissed with costs, counsel for the respondent not being called upon to argue. See 35 C.L.J. 498.

Johnston, Q.C., and *J. Heighington*, for appellants. *Aylesworth*, Q.C., and *H. W. Mickle*, for respondent.

HIGH COURT OF JUSTICE.

Falconbridge, J.]

COYLE v. COYLE.

[Dec. 27, 1899.

Summary judgment—Rule 616—Dismissal of action—Admissions on examination for discovery—Disclosing case.

The court or a judge has power in a proper case, to dismiss the action on an application under Rule 616.

In an action to recover a debt alleged to have been due by the defendant to the plaintiff's deceased father, the claim for which was assigned to the plaintiff by her mother, as administratrix of the father's estate, the plaintiff, on being examined for discovery, admitted that she had no personal knowledge on which she could succeed, but was relying upon an entry made in a book of her father that he had lent the defendant money on a certain day.

Held, that she could not be obliged to tell what evidence she was going to use nor what witnesses she meant to call; she could have been asked if she had disclosed her whole case, but, not having been asked that, it was open for her to say that she had evidence of facts outside of those within her own knowledge which might tend to establish her case and the action should not be dismissed.

O'Rourke, for plaintiff. *Mikel*, for defendant.

Boyd, C., Ferguson, J., Robertson, J.]

[Jan. 8.

GLOVER v. SOUTHERN LOAN CO.

Execution creditor—Mortgage sale—Application of surplus—Lien notes.

C. B. was owner of a farm subject to mortgages to the defendants, and also subject to a lien for the price of a machine purchased from the Sawyer-Massey Company. The machine had been bought by T. and promissory notes were given by T. and R.B. as surety for T. R.B. then owned part of the farm and executed a document giving a lien on his part of the farm for the price of the machine. The plaintiffs recovered judgment against G.B. and placed an execution against the lands in the sheriff's hands, which bound G.'s estate and interest in the lands as the then sole owner, he having acquired R.'s share. After this the defendant-mortgagees exercised their power of sale and sold the farm for enough to pay their mortgages and the lien charged on the land. The lien was thus satisfied out of the proceeds of the sale and an assignment was taken at the instance of the solicitor for the mortgagees both of the lien paper and the notes, which it guaranteed, to one N. who was an execution creditor for a small amount subsequent to the plaintiff's executions. This assignment was made on Feb. 17th, 1894, to N. absolutely by the Sawyer-Massey Company, and the notes were held by N. under her assignment until

December, 1898, when she brought action upon them, which action turned out fruitless as both makers were worthless. It was proved in this action that had T. been promptly proceeded against in 1895 when the notes had become payable the amount due upon the notes could have been recovered ; and he was the person primarily and properly liable to pay as he bought and had the machine.

Held, that the duty of the defendant-mortgagees on satisfying the lien for the machine out of the proceeds of the sale was to get in the notes forming part of the security for the machine ; that the notes were not paid by the application of the proceeds of the sale in discharge of the lien, because T. was the principal debtor in respect to them and the land was pledged merely as security for him ; that the defendant mortgagees being aware of the plaintiff's executions in the sheriff's hands should have secured the notes for the execution creditors ; and that inasmuch as through their inaction the value of the notes had been lost to the latter they were responsible to the plaintiffs in the amount of them.

Aylesworth, Q.C., for the plaintiff. *Wilson*, for the defendant, *Ramsdell*. *Farley*, Q.C., for defendant Loan Company.

Armour, C. J., Falconbridge, J.]

[Jan. 9.

GREENWAY v. GARDINER.

Contract—Furnishing heating apparatus—Guaranty as to degree of heat to be produced—Construction of.

On May 7th, 1898, the plaintiff entered into a contract in writing with the defendant to construct and complete by the 31st August, 1898, a hot water heating apparatus in a house being erected for the defendant, for which he was to be paid \$316, 80 per cent. thereof as the work progressed and the balance on the completion thereof, and he thereby also agreed that the apparatus would give seventy degrees of heat when the weather was ten degrees below zero. The apparatus was constructed and completed by the plaintiff, but wholly failed to give the promised heat. Thereupon, on Dec. 8, 1898, the plaintiff entered into a contract with the defendant, for the purpose of remedying, if possible, his breach of contract, for the consideration of the further sum of \$75, to make certain changes, and thereby guaranteed that the apparatus would heat the rooms in which the radiators were changed, to a temperature of seventy degrees when the thermometer registered ten degrees below zero outside ; the \$75 to be paid at such time as the apparatus had been tested under the above conditions, or, in the event of the temperature outside not marking ten degrees below zero before March 1, 1899, the \$75 to be paid at that date.

Held, that it could not be reasonably intended that if the thermometer never went down to ten degrees below zero before March 1, 1899, the plaintiff would be entitled to the \$75, although it were clearly proved that,

according to the proper construction of the guaranty, the apparatus would not heat the rooms in which the change was made to a temperature of seventy degrees, even when the thermometer registered less than ten degrees below zero.

Guarantees such as these are to be construed reasonably, according to the intent of the parties, and the more strongly against those giving them; *Parkhurst v. Smith*, Willes 327; *Hargrave v. Smee*, 6 Bing. 244; *Carlill v. Carbolic Smoke Ball Co.*, (1893) 1 Q.B. 256.

The proper and reasonable construction to be placed upon these guaranties was that the heating apparatus, if fed and managed in the ordinary way, would give seventy degrees of heat when the weather was ten degrees below zero, and would heat the rooms in which the radiators were changed to a temperature of seventy degrees when the thermometer registered ten degrees below zero outside.

The evidence shewed beyond reasonable doubt that the apparatus did not answer and was incapable of being made to answer these guaranties.

Hellmuth, for plaintiff. *J. M. McEvoy*, for defendant.

Falconbridge, J.]

[Jan. 11.]

CITY OF TORONTO v. METROPOLITAN R. W. CO.

Railways—Railway Committee of Privy Council—Junction of electric railway with C.P.R.—Laying switch on highway—Power to authorize—Expropriation of right of way—Injunction.

The defendants were a company incorporated under statutes of the Province of Ontario, operating an electric railway upon Yonge Street between the town of Newmarket and the city of Toronto, with its southern terminus in the northern part of the city, a few yards north of the C.P.R. lines. By order of Nov. 23, 1899, the Railway Committee of the Privy Council of Canada, reciting the consent of counsel on behalf of the corporation of the city of Toronto, approved of the defendants connecting their tracks with the tracks of the Canadian Pacific Railway by means of a switch, as shewn on a plan annexed to the order, and on the conditions imposed by the order.

Held, that the defendants had not the right, without the authority or consent of the city corporation, to occupy or expropriate or otherwise to force their way over a part of Yonge Street within the limits of the city so as to enter the lands of the Canadian Pacific Railway Company and make the proposed junction. The order of the Railway Committee was to be regarded as dealing only with the mode of junction or union, and not as expropriating or professing to expropriate a right of way over the highway. And the consent of counsel for the city corporation, when before the Railway Committee, was to be viewed in the same way. Section 173 of the Railway Act of Canada does not give the Railway Committee power to expropriate land or to deal with the right of property. The protection of the crossing or

junction is the object of the committee, which has to approve of the place and mode thereof, and which is not concerned, so far as this section applies, with how the railways arrive at the point of union.

Held, also, that the defendants had not, by virtue of any statute or agreement, viewing their road as a mere street railway, the right to expropriate the right of way; and even if their road was a railway within the meaning of the Railway Act, s. 183 was not applicable, for the proposition here was not to carry the tracks "along an existing highway," and they could not avail themselves of s. 187, for the provisions of law applicable to the taking of land by the company had not been complied with. The plaintiffs were therefore entitled, without derogation of the order of the Railway Committee, to an injunction restraining the defendants from effecting the proposed junction by the method shewn on the plan.

By an agreement made between the plaintiffs and defendants in 1891, the defendants agreed and undertook that upon receiving at any time twenty-four hours' notice from the plaintiff's engineer they would cease running their cars by electricity on the portion of Yonge Street within the city limits.

Held, that, nothing having occurred to operate as a waiver by the plaintiffs of this term of the agreement, and the engineer's notice having been given on the 14th November, 1899, the plaintiffs were entitled to an injunction restraining the defendants from propelling their cars by electricity within the limits of the city.

Osler, Q.C., and *Caswell*, for plaintiffs. *Aylesworth*, Q.C., and *W. Barwick*, Q.C., for defendants.

Armour, C.J., Falconbridge, J., Street, J.]

[Jan. 23.

TEW v. ROUTLEY.

Landlord and tenant—Lease—Assignment without leave—Forfeiture—Election—New lease—Waiver—Distress—Acceleration clause—Assignment for the benefit of creditors—Notice under R.S.O. c. 170, s. 34, s-s. 2—Sale of goods on demised premises—Agreement—Condition—Construction.

A lease of a store was made for five years, at the yearly rental of \$700, payable by even portions quarterly in advance, with the statutory covenant that the lessee should not assign or sublet without leave, and with a proviso that if the lessee should make an assignment for the benefit of creditors, the then current and the next quarter's rent and the taxes for the then current year should immediately become due and payable as rent in arrear, and be recoverable by distress or otherwise. During the term, on Jan. 24, 1898, the lessee made an assignment for the benefit of his creditors to the plaintiff, who sold the stock of goods in the store to the defendant. By the terms of the agreement of sale the defendant was to assume the rent and taxes and to arrange with the landlord of the premises as to tenancy. On

the 14th February, 1898, the defendant's husband went into possession of the store and of the stock of goods, which had remained therein, and continued thereafter in possession of the store. On April 5, 1898, the lessors distrained the goods of the defendant in the store for \$644, made up of \$175 rent due on Oct. 1, 1897, \$175 rent due on Jan. 1, 1898, \$175 for "the next quarter's rent," by virtue of the proviso in the lease, and \$119 for the taxes for 1898, in respect of which sums they claimed to be preferred creditors on the estate of the lessee. The plaintiff paid the claim and costs under protest, and brought an action against the lessors to recover back \$319.32 of it, which action was dismissed on the 14th December, 1898; (*Tew v. Toronto Savings and Loan Co.*, 30 O.R. 76.)

On Dec. 17, 1898, the lessors made a lease of the store to the defendant's husband to hold for three years from Feb. 14, 1898. In this action the plaintiff alleged that he was entitled to be paid by the defendants \$322, being the proportion of the rent from Feb. 1 to July 1, 1898, which the defendant agreed to assume and pay. At the trial it appeared that the lessors never consented in writing to the assignment of the demised premises to the plaintiff, and that the plaintiff never assigned the premises to the defendant, and that the lessors never recognized as rightful the occupation of the premises by the defendant. The plaintiff did not give notice to the lessors, under R.S.O. c. 170, s. 34, s.-s. 2, electing to retain the store for the unexpired term, or any portion of it.

Held, that the lessors, by granting the lease of Dec. 17, 1898, elected to avoid their former lease, they having done nothing in the meantime to waive the forfeiture thereof incurred by the assignment to the plaintiff. The distress was no waiver of the forfeiture, for it was for rent and taxes which became due by virtue of the provisions of the lease on the date of the assignment. The election to forfeit the original lease referred back to the time when the breach of the terms of that lease occasioning the forfeiture took place, that is the date of the assignment. The plaintiff might have avoided the forfeiture of the lease and the acceleration of the payment of the rent and taxes by giving, within one month from the execution of the assignment, a notice in writing to the lessors electing to retain the store for the unexpired term or a portion of it.

Held, also, that the condition in the agreement of sale between the plaintiff and defendant, that the latter was to assume the rent and taxes and to arrange with the landlord as to tenancy, did not mean that the defendant was to assume any part of the rent and taxes which by virtue of the provision of the lease had become due on the previous Jan. 28, but rather that the defendant should arrange with the landlord as to tenancy and assume the rent and taxes payable in virtue of the tenancy so arranged.

Aylesworth, Q.C., for defendant. *C. D. Scott*, for plaintiff.

Falconbridge, J., Street, J.]

[Jan. 30.]

TORRANCE v. CRATCHLEY.

*Mechanics' lien—Twenty per cent. reserve—Payment before thirty days—
R.S.O. c. 153, s. 11.*

All work on a building was finished on August 11, 1899. On August 14, 1899, four workmen whose wages remained unpaid and who were entitled to liens for the amount, threatened to register their liens unless paid at once. The owner thereupon paid the amount; and afterwards treated the same as deducted from the twenty per cent. retained under R.S.O. c. 153, s. 11, and proceedings having been commenced the owner paid the balance of the twenty per cent. into court. The balance so paid in, however, was more than sufficient to pay all remaining wage-earners in full.

Held, that under the above circumstances the owner was justified in making the payments out of the twenty per cent. before the expiration of the thirty days mentioned in the Act and could not be required to pay the sum over again into court. By making such a payment, however, the owner takes the responsibility of showing that he has placed the other lien-holders in no worse position by his action as has been shewn in the present case.

Ritchie, Q.C., for appellant, the owner. *Douglas*, for plaintiffs. *McCord*, *Cook* and *Rowen*, for various lien-holders.

Armour, C.J., Falconbridge, J., Street, J.]

[Jan. 31.]

RAE v. RAE.

Alimony—Desertion—Offer to receive wife back—Bona fide.

The decision of MEREDITH, C.J., 35 C.L.J. 612, affirmed on appeal. *Holman*, Q.C., for defendant. *Aylesworth*, Q.C., for plaintiff.

Armour, C.J., Falconbridge, J., Street, J.]

[Feb. 5.]

IN RE MICHELL v. THE PIONEER STEAM NAVIGATION COMPANY.

District Courts—Unorganized territory—Jurisdiction—Vendors and Purchasers Act—R.S.O. c. 109, s. 7.

Held, that notwithstanding anything in R.S.O. c. 109, s. 7, and R.S.O. c. 51, s. 185, the Local Judge of the High Court in the district of Rainy River had no jurisdiction to deal with the applications under the Vendors and Purchasers Act, R.S.O. c. 134, or under the Land Titles Act, R.S.O. c. 138.

C. C. Robinson, for appellants. *Ferguson*, for respondents.

Meredith, J.]

TURTLE v. TOWNSHIP OF EUPHEMIA.

[Feb. 8.

Ditches and Watercourses Act—Award—Engineer—Appointment—Revocation—Notice—Jurisdiction—Estoppel—Appeal.

By s. 4 (I) of the Ditches and Watercourses Act, R.S.O. c. 285, it is provided that "every municipal council shall name and appoint by by-law (Form A) one person to be the engineer to carry out the provisions of this Act, and such engineer shall be and continue an officer of such corporation until his appointment is revoked by by-law (of which he shall have notice) and another engineer is appointed in his stead, who shall have authority to commence proceedings under this Act or to continue such work as may have been already undertaken." The defendants' municipal council appointed R. such engineer, in manner provided by the Act, in April, 1895, and he accepted the office and acted and continued in it. In 1898 they, without any notice to R., and without any by-law expressly revoking his appointment, passed a by-law purporting to appoint S. as such engineer. In both appointments the form of by-law prescribed by the Act was used; the latter by-law in no way referring to the former or to R.

Held, that the prior appointment had not been revoked; that S. did not become "the engineer"; and that an award purporting to be made by him as such engineer under the Act was invalid. S. was not de jure the engineer, because R.'s appointment had not been revoked by by-law, either with or without notice to him; and semble, that the notice required was of intention to revoke. The defendants could not assent that S. was de facto the engineer, for he had not the reputation of being the engineer.

Held, also, even supposing that consent could confer jurisdiction, or that plaintiffs might waive or be estopped from urging an objection to S.'s jurisdiction, that there was no reasonable evidence of any such consent, waiver, or estoppel; for the plaintiffs' requisition called for "the engineer," and it was the act of the township clerk which called in S. instead of R.; the plaintiffs did not know who was the engineer; they had heard that S. had been appointed, but neither of them knew that R.'s appointment had not been revoked by by-law of which he had had notice. The point was raised upon an appeal against the award and was overruled; but as it went to the root of the jurisdiction of the whole proceedings, including such appeal, there was nothing in such proceedings which could prevent a consideration of the question now.

T. G. Meredith and Dromgole, for plaintiffs. *W. J. Hanna*, for defendants.

IN THE SURROGATE COURT OF THE COUNTY OF LANARK.

Senkler, Co. J.] IN RE ESTATE OF H. S. LECKIE. [Jan. 17.

Administration — Solicitor executor — Costs — Remuneration to executor — Trustee Act, R.S.O. c. 129.

On the passing of executors' accounts, one of the executors, being a member of the firm of solicitors who acted for the estate, the bill of costs of the executor solicitor's firm was objected to on the ground that an executor can make no profit out of the estate.

The facts sufficiently appear in the judgment of:—

SENKLER, Co. J.—This matter comes before me in a rather exceptional manner. The testator appointed three executors, who all took probate, the survivor of whom was the widow, Mary Leckie, who took a life-interest. By her will, J. F. Kellock and J. M. Balderson were appointed executors, and they took probate of her will, thereby becoming executors of Henry S. Leckie's estate. This is an application by the executors to pass their accounts as executors of Henry S. Leckie's estate. Mr. Balderson, the executor, is a member of the firm of Matheson & Balderson, who (Mr. Matheson while practising alone, and the firm since) acted as solicitors for Mr. Leckie in his lifetime and for Mrs. Leckie in her lifetime. These proceedings are in the name of Matheson & Balderson as solicitors. Mr. Balderson appeared on the application, and Mr. F. A. Hall as agent for the official guardian for the infants interested. No one else appeared, though all parties had been notified. Upon reaching the item of solicitor's bill, the quantum was objected to; and upon my stating that unless the amount was agreed upon I should direct a taxation, the amount was then fixed by agreement. The costs of the application were taxed and the balance adjusted, subject to the payment of succession duties. The matter stood over for the payment of the succession duties and filing of evidence of payment. Before the parties dispersed, Mr. J. A. Allan appeared for Mrs. M. J. Kellock, a legatee, and took the figures to submit to his client. Subsequently, Mr. Balderson, Mr. Hall and Mr. Allan appeared before me, when Mr. Allan objected to the allowance of everything in the solicitor's bill beyond costs out of pocket on the ground that a solicitor executor could not recover for professional services rendered by himself or his firm for work out of Court. He also objected, but not so strenuously, that the same objection applied to the petitioner's costs of passing the accounts.

The rule in England is to follow the old rule, long established, that a trustee or executor cannot make a profit out of his office. An exception was made in *Craddock v. Piper*, 1 Mac. & G. 664, to the effect that a solicitor, trustee, etc., a member of a firm who acted in suits as solicitors for all the trustees in some suits, and for cestuis que trust in others, did not prevent the firm recovering costs of suits awarded, provided the costs were

not increased by the addition of the solicitor trustee as a party. In *Broughton v. Broughton*, 5 DeG. M. & G. 166, it was held that work out of Court under similar circumstances did not come within the exception. There are doubts expressed as to the propriety of the exception, as decided in *Craddock v. Piper*, but that case is now considered as too well settled to be disturbed. In this country *Craddock v. Piper* has been followed in *Meighen v. Buell*, 25 Gr. 604, and *Strachan v. Ruttan*, 15 P.R. 101.

The point as to services performed out of Court has not been decided in this country, so far as I can find. In *Holmsted & Langton*, at p. 848 (note), there is a suggestion that the English rule does not apply in this country, owing to R.S.O. c. 129, s. 40. Sec. 43 of that Act applies to this Court (Surrogate Court).

In an experience extending over twenty-six years, this is the first occasion in which I have had to face this question. In the absence of any decision in this country, I must dispose of the question as one of first impression. The Legislature having enacted by s. 43 that "The Judge of the Surrogate Court may allow the executor, trustee or administrator, acting under a will or letters of administration, a fair and reasonable allowance for his care, pains and trouble, and his time expended in or about the executorship, trusteeship or administration of the estate and effects vested in him under the will or letters of administration, and in administering, disposing of, and arranging and settling the same, and generally in settling the affairs of the estate, and may make an order or orders from time to time therefor, and the same shall be allowed to an executor, trustee or administrator in passing his accounts," has made a departure from the rule in England, which was probably introduced into this country, that a trustee cannot make a profit of his office. It must be observed that the allowance is for services in the most comprehensive words, but is hedged round with care, for it can only be allowed by the judge; can never be *ex parte*. If made on a substantive application, it can only be made after due notice, and, when made, is a judicial adjudication. If made, as is usually the case, on the passing of accounts, which can only be done on the application of a party adverse in interest, or when infants are interested, R.S.O. c. 50, s. 73. In the latter case, the official guardian represents the infants; therefore, in all cases the claim for allowance of remuneration is subject to close scrutiny. It seems to me that for a class of work like solicitor's work a bill of items which can be scrutinized is more satisfactory than the fixing of a percentage.

I therefore allow the solicitor's bill of costs as part and parcel of the remuneration. The costs of passing the accounts being entirely work in Court must be allowed. If, upon appeal, it should be held that the solicitor's bill should not be allowed them, in my opinion the quantum of the allowance to the executors should be reconsidered, as I took into account the solicitor's bill in fixing the remuneration.

Province of Nova Scotia.

SUPREME COURT.

Full Court.]

CRAIG v. MATHESON.

[Feb. 7.

Building contract—Sub-contractor—Consideration—Burden of proof—Acceptance of order for payment—Authority—Bills of Exchange Act, s. 23—Money had and received—Costs.

Plaintiff contracted with F. for the sum of \$200 to do the plumbing of a house which F. had contracted to build for the defendant, W.E.M., according to specifications which included plumbing. F. having failed to complete his contract plaintiff sought to recover the amount due him from W.E.M., whose wife, M.M., was joined as a co-defendant, alleging that before he undertook the work he saw M.M., who was acting for W.E.M. in his absence, and that she agreed to pay him the \$200 and keep it out of the contract.

Held, that the promise alleged, if made, was gratuitous and not legally binding; that it would take strong evidence as to consideration and as to the intent of the parties to give the promise an effect which would make the party promising liable to pay plaintiff; that the burden of proof was on plaintiff, and the evidence on the point contradictory and unsatisfactory. The finding of the trial judge that plaintiff looked to defendants as his paymasters and did the work for them and not for F. must be set aside.

After the work which plaintiff contracted to do had been completed, F. drew an order on M.M. for the amount to which plaintiff was entitled, which M.M. accepted in these terms: "Accepted by Mrs. Matheson."

The trial judge found that M.M. had no authority to accept so as to bind her husband, but that the latter had ratified his wife's act and was liable on the order.

Held, 1. Reversing this finding, that the acceptance being one which purported to be binding only upon M.M. was incapable of ratification by the defendant W.E.M., and that the doctrine of ratification was inapplicable.

Held, 2. The document was governed by s. 23 of the Bills of Exchange Act and that no one could be made liable on it as acceptor who had not signed it as such.

Held, 3. The action for money had and received was inapplicable to the case under consideration, such action lying only where a person has received money under circumstances rendering the receipt of it a receipt by such person to the use of the plaintiff.

Appeal allowed and judgment entered for defendants with costs.

A. E. Silver, for appellant. F. J. Tremaine, Q.C., for respondent.

Full Court.]

GROWELL v. SMITH.

[Feb. 7.

*Fishing voyage—Action for goods furnished, etc., in connection with—
Managing owner held not liable in absence of contract—Costs.*

In an action by plaintiff, part owner of a fishing vessel, against defendant, managing owner of the vessel, for supplies furnished and advances made to the captain and crew in connection with a fishing voyage, it appeared that prior to the time of the alleged furnishing of supplies, etc., the vessel was let to the captain on the quarter lay, viz., on terms that the captain and crew should prosecute the voyage, and should, at the end of the fishing season or sooner, dispose of the fish caught and render to the owners of the vessel one-quarter of the proceeds, the remaining three-quarters to be the property of the captain and crew.

Held, that there being no legal liability on the part of defendant it was incumbent upon plaintiff to establish a contract against defendant, and there being no evidence express or implied of such contract, the judgment entered for plaintiff at the trial should be reversed, and judgment entered for defendant with all costs.

McCoy, for plaintiff. *Drysdale*, for defendant.

Province of New Brunswick.

SUPREME COURT.

En Banc.]

VIOLET v. MARTIN.

[Feb. 9.

Security for costs—Temporary residence within province.

The plaintiff resided at VanBuren, Me., and removed across the line to New Brunswick, temporarily, for the purpose of bringing this action.

Held, on an application for security for costs, that her residence within the Province at the time of the application, though temporary and for the purpose of defeating an application for security of costs, was a sufficient answer to the application.

A. R. Slipp, for defendant. *C. E. Duffy*, for plaintiff.

En Banc.]

HICKS v. OGDEN.

[Feb. 9.

*Particulars—Amendment at trial—Affidavit of prejudice—Postponement—
Offer to suffer judgment.*

In opposition to an application for the amendment at trial of plaintiff's particulars by the addition of an item for an account stated, and an item for ten month's additional wages, defendant's attorney made affidavit that when he saw the plaintiff's claim was less than the payments made by defendant and his set-off, he did not in preparing for trial enquire particularly into the plaintiff's account, considering a judgment against plaintiff of no value; that had his claim contained the additional items sought to be added he would, had he found them to be correct,

offered to suffer judgment; that he was absolutely unprepared to make defence to the additional claim, and that great injustice would be done to defendant if the amendment were allowed, and defendant forced to go to trial at the circuit then being held. Defendant also made affidavit that he could not safely enter upon his defence to the additional claim without the evidence of one whose attendance he could not procure for two or three days. The judge allowed the amendment, but waited for the witness referred to and then proceeded, when the jury found for the plaintiff.

Held, on motion for new trial, Barker and McLeod, JJ., dissenting, that the amendment should not have been allowed under the circumstances without postponement of trial till next circuit. New trial ordered.

M. G. Teed, for plaintiff. *H. A. Powell*, Q.C., for defendant.

En Banc.] EX PARTE VANWART. [Feb. 9.
Judgment debtor—Ex parte order for examination—Judge of Supreme Court—Privilege.

Held, Tuck, C.J., dissenting, that an order for examination of a judgment debtor under s. 36 of 59 Vict., c. 28, should not be made ex parte.

Held, also, per Tuck, C.J., Landry and Barker, JJ., Hannington J., dissenting, that a Judge of the Supreme Court is not privileged from examination as a judgment debtor under said Act. Rule absolute for certiorari to remove order for examination.

A. H. Hannington, Q.C., and *W. Pugsley*, Q.C., in support of rule. *G. F. Gregory*, Q.C., contra.

En Banc.] STEWART v. CANADIAN PACIFIC RAILWAY CO. [Feb. 9.
Writ—Wrong name for that of plaintiff in conclusion—Amendment.

An attorney's clerk in preparing a county writ, inserted a wrong name for that of the plaintiff in the conclusion of the writ. The defendant did not appear and the plaintiff signed interlocutory judgment. An application was afterwards made to the County Court Judge to set aside the writ and interlocutory judgment. The plaintiff asked for leave to amend. The judge, however, held that the writ was a nullity, refused the application for leave to amend, and set aside all the proceedings.

Held, on appeal, that the County Court Judge was wrong in treating the writ as a nullity, and should have granted the leave to amend.

Thos. Lawson, for appellant. *A. B. Connell*, Q.C., for contra.

En Banc.] EX PARTE JONES. [Feb. 9
Costs of appeal—Execution against corporation—Leave to issue.

Held, that it is not necessary to apply for leave to issue execution against a corporation for costs of appeal to the Supreme Court of Canada.

L. A. Curry, Q.C., for applicant.

En Banc.]

EX PARTE ALLAIN.

[Feb. 9.

Affidavit—Marksman—Jurat—Deviation from Rule of Court.

Held, on motion to make absolute an order nisi for certiorari, that the omission from the jurat of the affidavit of a marksman of the word "he" and the use of the words "seemed fully to understand," instead of "appeared perfectly to understand," was not such a deviation from the rule of Court as would invalidate the jurat. Rule absolute for certiorari.

M. G. Teed, in support of rule. *J. D. Phinney*, Q.C., contra.

En Banc.]

EX PARTE MCCLEVE.

[Feb. 9.

C. T. Act—Search warrant—Order for destruction executed by informant.

Held, Tuck, C.J., and McLeod, J., dissenting, that a constable, upon whose information a search warrant and an order for the destruction of liquors under the C. T. Act were issued, could not legally execute the search warrant or the order for destruction of the liquors. Rule absolute for certiorari to remove order for destruction.

M. J. Teed, in support of rule. *W. B. Chandler*, Q.C., contra.

En Banc.]

ADAMS v. STOUT.

[Feb. 9.

Runaway—Negligence in not getting out of way of—Damage sustained by owner of runaway.

In an action in the St. John County Court for damages caused by a collision between plaintiff's and defendant's waggons, plaintiff's evidence was that his horse became frightened, that he was unable to hold him in, but kept him as close as possible to the gutter on the left hand side of the road; that he saw defendant, about 1000 feet away, coming towards him on the same side of the road and shouted to him to get out of the way, but that the latter failed to do so, the result being a collision by which plaintiff's waggon and harness were damaged. Defendant's evidence was that he went over to his right hand side of the road to speak to a man sitting on a door step, when he saw plaintiff's horse coming towards him on the run, about 100 yards off; that he sheared off to the left and was about five feet from the gutter when plaintiff's waggon struck his. The judge found a verdict for plaintiff.

Held, per Tuck, C.J., and Hannington, Landry and VanWart, JJ., that verdict should have been for defendant.

Per Barker and McLeod, JJ., that although they might have found differently on the evidence, the County Court Judge's finding should not be disturbed.

Appeal allowed with costs, with direction for a new trial, no leave having been reserved to move for verdict for defendant.

W. Pugsley and *E. R. Chapman*, Q.C., for appellant. *A. O. Earle*, Q.C., and *W. A. Erving* contra.

En Banc.] RECEIVER GENERAL OF N.B. v. TURNBULL. [Feb. 9.
Succession Duty Act—Voluntary transfer in contemplation of death.

Testator, who died in 1899, seven years before his death voluntarily transferred 1146 shares in the Turnbull Real Estate Co., of the value of \$114,600, to his children.

Held, that they were not liable to succession duties under s. 5 of The Succession Duty Act of 1896, relating to voluntary transfers of property in contemplation of death.

A. S. White, Q.C., for plaintiff. *A. O. Earle*, Q.C., and *S. Alward*, Q.C., for defendant.

Province of British Columbia.

SUPREME COURT.

McColl, C.J.] ROBERTSON v. BEERS. [Dec. 12, 1899.
Practice—Ca. re.—Affidavit—Irregularity—Waiver by giving bail.

Summons to set aside an order and the writ of *capias* issued thereunder and for delivery up of the bail deposited with the sheriff, on the grounds that: (1) The affidavit did not disclose a good and sufficient cause of action and is bad. (2) That the writ of *ca. re.* was not in the statutory form. (3) That the affidavit was not sufficient as to the defendant's intention to leave British Columbia.

The following were the irregularities in the writ of *capias* complained of: (1) That the style of cause was inserted, whereas there should be no style of cause, the form not making provision for this. (2) Vancouver was specified as the place for putting in special bail, whereas the form provides no place. (3) The expression, proceedings "may be taken" instead of "may be had and taken." (4) In the warning "a defendant" instead of "the defendant" and "plaintiff" instead of "plaintiffs."

The affidavit of J. H. S., on which the order for arrest was made, was in part as follows: "(1) That I am bookkeeper for the plaintiffs, and as such have a personal knowledge of the state of the accounts between the plaintiffs and defendant. (3) That the defendant, Norman Beers, is justly and truly indebted to the plaintiffs in the sum of \$482.19 for lumber and material supplied to the said Norman Beers at his request. (4) That on or about the 29th day of November, A.D. 1899, I saw the defendant Norman Beers, and pressed him for payment of the plaintiff's account. He then promised to give me an order on Messrs. Bowser, Godfrey & Co., for at least \$200 of the plaintiff's claim. (7) That I am informed by Ernest Evans, of the City of Vancouver, merchant, that the said Norman Beers informed him that he intended leaving for Dawson, and the said defendant also informed me to the same effect himself."

Paragraph 2 of the defendant's affidavit read on the return of the summons was as follows: "I did not intend leaving the Province of British Columbia permanently, but I have changed my residence from the City of Vancouver to the City of Victoria, and on my leaving Vancouver on the 3rd instant I intended to return to Vancouver, and then procured and have now in my possession a return ticket from Victoria to Vancouver.

Held, 1. That the statements in the affidavit as to the debt and intention to leave the province were sufficient.

2. A defendant arrested under a writ of ca. re. admits by implication his intention to leave the province by denying his intention to leave it permanently.

3. By the giving of bail, a defendant so arrested waives his right to object to irregularities in the writ.

Harris, for summons. *Marshall*, contra.

North-West Territories.

SUPREME COURT.

Rouleau, J.]

WRIGHT v. SHATTUCK.

[Jan. 27.

Practice—Commission to take evidence of witnesses abroad—Examination of party thereunder.

Upon the application of the defendant, an order was made for the issue of a commission to take the evidence of witnesses in the Province of Ontario. The plaintiff had consented to the order upon the condition that he should also be allowed to call witnesses before the Commissioner on his own behalf. The order accordingly provided that a commission issue for the examination of witnesses on behalf of both the plaintiff and the defendant. It contained the names of none of the witnesses intended to be examined. Upon taking the evidence under the commission, the plaintiff's counsel tendered the evidence of the plaintiff himself, having given the two days' notice of his intention to do so provided for in the order, and his evidence was taken subject to objection. The commission was opened at the trial of the action and the defendant objected to the reading of the plaintiff's evidence on the ground that the commission and the order under which it was issued were not wide enough to include the taking of the plaintiff's evidence.

Held, that the evidence given by the plaintiff under the commission must be suppressed, as the Commissioner had no authority to examine him; also, that the application to suppress could either be made in Chambers by summons or to the Court directly, upon the trial of the action.

R. B. Bennet, for the plaintiff. *McCarthy*, Q.C., for the defendant.

Book Reviews.

Limitation of Actions against Trustees and Relief from Liability for Technical Breaches of Trust, being a concise treatise upon the position of trustees, by FRANCIS A. ANGLIN, B.A., Barrister-at-Law. Toronto: Canada Law Book Company, 1900.

The law regarding the liability of trustees as affected by Statutes of Limitations has been radically changed during the last few years by the Imperial Act, 51 & 52 Vict., c. 59, s. 8, adopted in Ontario in 1891, see R.S.O. (1897) c. 129, s. 32, and in Nova Scotia in 1889 by 52 Vict., c. 18, s. 17; but we are not aware of any text-book which deals with this subject at all comprehensively.

Mr. Anglin, in the excellent little treatise before us, begins by concisely stating the difficulties under which trustees formerly laboured and which these enactments were designed to remove for the relief of "the honest trustee." He then proceeds to give a clear and well-arranged exposition of the effect of our statutes, dealing first with its scope and the cases excepted from its remedial operation, and then discussing and illustrating the many instances in which the statute will be found of substantial benefit to the trustees. The second part deals with the enactments whereby courts are enabled to relieve trustees from liability when, without dishonesty or culpable negligence or imprudence, some technical breach of trust has been committed.

Though professing to deal with a comparatively narrow branch of the law of trust and trustees, the author has introduced much information which will be of service to those seeking it upon other points connected with the duties and responsibilities of trustees and with the general law of limitations of actions. The work contains an appendix in which the statute law of England, Ontario, Nova Scotia, New Brunswick, Manitoba and British Columbia, affecting the subject dealt with in the text, is collated, and concludes with what appears to be a copious and satisfactory index. Mr. Anglin writes in a clear and forcible style, which makes easy the reading of his book. The publishers have done their part excellently well, the work being both in style, paper and printing quite equal to anything that we have seen published in England.

RULES PASSED 17TH FEBRUARY, 1900.

- 1230. (26) Clause 4 of sub-section (b) of Rule 26 is amended by adding thereto the following:—"when the same shall be transmitted to the Central Office, to be dealt with under Rule 340."
- 1231. (341) Rule 341 is hereby amended by striking out the word "Toronto" and the words "or in a Divisional Court" in the second line thereof.
- 1232. (792) Sub-section 2 of Rule 792 is hereby repealed and the following substituted for it:—
 (2) The party making the motion shall not be entitled, unless by leave of a Judge or of the Court, to set it down until the Record and Exhibits have been, and it shall be his duty to cause them to be, transmitted to the Central Office.



MATTHEW WILSON, Q.C.

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NO. 6.

MATTHEW WILSON, Q.C.

Matthew Wilson, Q.C., whose portrait appears on the opposite page, is a leading member of the bar of Western Ontario. He was born in the County of Kent on August 28th, 1854, being the son of the late Robert Wilson, a native of Dublin, Ireland, and of Anglo-Saxon origin. He received his education in Chatham, Whitby and Toronto, and having chosen to follow the legal profession, he served his time in one of the great firms of former days—Harrison, Osler & Moss—two of whose members afterwards became Chief Justices and two others now sit as judges in the Court of Appeal. Mr. Wilson, following the example of the senior member of the firm under which he studied, gave special attention to municipal law, and has for some years been recognized as an authority in that branch, and to-day must have very nearly, if not quite, the largest clientele of municipal corporations in the province, and in drainage cases he may safely be said to be *facile princeps*.

Mr. Wilson was called to the bar in 1879, made a Q.C. in 1889, and is now at the head of the firm of Wilson, Kerr & Pike, Chatham, Ont. In 1894 he was elected president of the Western Bar Association, which position he still holds.

He takes an interest in legal literature, some of his articles finding their way into some of the American legal periodicals as well as into the lay press of this country. His energies have not been confined to his chosen profession. He has long been an advocate and liberal supporter of higher education in all its branches, and he has for years been a member of the council of Huron Divinity College, and a senator of the Western University of London. An Anglican in religion, he is a foremost advocate in the church and its councils, being a delegate from the Synod of Huron to the first General Synod for Canada, and afterwards made a member of the Supreme Court of that body.

As a lawyer and as a citizen Mr. Wilson enjoys the confidence and esteem of the profession and the public. He is a ready and graceful speaker, a keen debater, and has the art of putting a

great deal of matter into a few words. Although an active conservative and a convincing platform speaker, he has never been induced to become a candidate for any political office or position.

In 1882 Mr. Wilson married Anna Marsden, eldest daughter of C. R. Atkinson, Q.C., Chatham.

Our portrait is copied from a photograph of Mr. Wilson as he appeared before the Judicial Committee of the Privy Council. The costume is unknown in the Dominion, except, strangely enough, in the extreme westerly province of British Columbia.

The following appointments have been made to the County Court Bench: J. R. O'Reilly, Q.C., of Prescott, has been appointed judge of the County Court of the United Counties of Stormont, Dundas and Glengarry in the place of Judge Pringle resigned. Neil McCrimmon, barrister, of Toronto, fills the vacancy caused by the death of G. H. F. Dartnell, late judge of the County of Ontario; and Robert B. Carman, junior judge of Stormont, Dundas and Glengarry, becomes judge in the room of E. J. Senkler, deceased, late County Judge of Lincoln.

The *Central Law Journal* calls attention to the case of *Marden v. Dorthy* decided by the Court of Appeals of New York, which, it is said, has caused great discussion and comment in that State, and is worthy of note by practitioners of this country. As stated by our contemporary, the facts of the case were that the owner of property was induced by artifice to sign her name to a paper without any knowledge that it was a deed, and she had no intention of conveying her property. The deed was never delivered nor acknowledged, but a genuine certificate of acknowledgement was in some way obtained and the deed recorded. No consideration passed, and the grantee had no knowledge of the deed, and was induced by artifice to sign papers which proved to be mortgages on the property. The owner lived on the property, with the grantee, her daughter, her name appearing in large letters on the doorplate and house block, and the alleged bona fide mortgagees resided in the same city. It did not appear that the mortgagees ever saw the genuine signature of the owner, or made any investigation beyond the record. It was held that the owner was not estopped from questioning the validity of the fictitious mortgages

and was entitled to have them cancelled. Two of the judges dissented from the conclusion of the majority.

It has frequently been remarked that in the development of countries certain classes of litigation from time to time prevail. In this country we have arrived at the damages-for-negligence epoch. An increasing number of these actions in proportion to other litigation are tried every year. This is not to be wondered at considering the extraordinary activity in the use of machinery, rapid production of manufactured articles, and new means of transit. In addition to actions of this nature of a legitimate character, there are, of course, many which are purely speculative; and in this connection one is compelled to recognize the fact that certain members of our profession degrade its honorable traditions by being parties to proceedings which should never have been taken, and which partake of the nature of blackmail. An instance of this kind recently came before an English judge. The action was by a child against a cab owner for negligence. The verdict was for the defendant, whose counsel had no hesitation in saying that the suit was obviously brought in the interests of the solicitor. The judge, being apparently of the same opinion, eventually put the solicitor in the witness box, with the result that he was ordered to pay the costs instead of his client. This seemed a practical way pour encourager les autres. A drastic measure of this sort even in this country, where we may justly claim for our brethren quite as high an average standard of morals as even amongst English solicitors, might sometimes be beneficial.

The *Law Times* in its issue of February 10, in commenting on this order of Mr. Justice Darling, says that it will be of far-reaching effect, and should not be accepted without some hesitation. However salutary such an order might seem to be, it involves grave results, for it is very difficult for any solicitor under certain circumstances to be at all certain as to the result of an action which may appear to have its meritorious side, and there are cases which must be largely speculative. The writer instances a foreign governess, who was wrongfully dismissed without salary, her luggage detained, and herself thrown on the streets with no means,

and properly says that it would be lamentable if such a person were deterred from obtaining redress by fear of any such rule as above laid down. To avoid such an order a solicitor must be prepared to answer the allegation that there was a clear point decisive of the action against his client. The writer therefore expressed a hope that the ruling of the learned Judge might be reviewed, and the limits of a Judge's jurisdiction in such matters strictly defined.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act.)

CRIMINAL LAW—BAIL—INDEMNITY TO BAIL—CONTRACT, ILLEGALITY OF.

Consolidated Exploration Co. v. Musgrave (1900) 1 Ch. 37, was an action brought to obtain a retransfer of certain shares, which had been transferred to the defendant, Musgrave, under the following circumstances: Two persons, named Ainsworth and Jordan, were indicted for fraud in promoting a company. Ainsworth applied to Musgrave to become bail for himself and Jordan, which Musgrave agreed to do upon Ainsworth procuring to be transferred to him 1,500 shares of the London Woolen Co., as an indemnity for the liability to be incurred by him as such bail. The shares 'belonged to the plaintiff company, and Ainsworth procured a resolution to be passed, by persons purporting to act as a board of directors of the plaintiff company, authorizing the transfer of the shares to Musgrave, which was accordingly done, but it appeared that the plaintiff company authorized the transfer to be made as a security for costs, and it did not appear by the resolution that it was intended to be by way of indemnity for his going bail. Subsequently Jordan absconded, his bail was estreated, and Musgrave was compelled to pay £1,500. It was contended by the plaintiff company that the bargain between Ainsworth and Musgrave was illegal, as being a contract to indemnify bail in a criminal proceeding. The defendant, Musgrave, on the other hand, contended that though an indemnity given by Ainsworth himself

to Musgrave would have been illegal, his procuring the plaintiffs to indemnify him was not so, and that in any case the plaintiffs were in *pari delicto*. North, J., however, held that the transaction was illegal, and that the plaintiffs were in no way participators in the illegality and were therefore entitled to have the shares retransferred as they claimed.

SOLICITOR—AUTHORITY TO DEFEND—DEFENDANT COMPANY, DISSOLUTION OF, PENDENTE LITE—JUDGMENT AGAINST DISSOLVED COMPANY—ABATEMENT—COSTS, LIABILITY OF SOLICITOR FOR.

Salton v. New Beeston Cycle Co. (1900) 1 Ch. 43. After judgment had been recovered against the defendant company in this action, it was discovered that the company had been dissolved, and the judgment was consequently invalid. The plaintiff thereupon applied to set aside the proceedings subsequent to the dissolution, and to compel the solicitor who had continued to act for the defendant company after its dissolution, to pay the costs of the abortive proceedings. It appeared that the action was tried on 16th March, 1899, and judgment was given on the 23rd March, and that the company had been dissolved on 12th November, 1898. The solicitors for the defendant company were instructed to defend in February, 1898, the company being then in liquidation, and it was subsequently dissolved as the result of the liquidation proceedings. The solicitor had no knowledge of there having been a final meeting of the defendant company until the day of trial, and they took no steps then to find out whether the dissolution of the company had taken place. The solicitor contended that the judgment was valid notwithstanding the dissolution. Stirling, J. held that the judgment was invalid, but that the solicitors were not liable for costs incurred before they had notice of the final meeting, he however said that they were then negligent in not making the necessary inquiries to find out whether a dissolution of the company had taken place, and in consequence were liable for the costs subsequently incurred.

DEVOLUTION OF ESTATES—LAND TRANSFER ACT, 1897, (60 & 61 VICT., c. 65), s. 1, s. 2, SUB-S. 2 ; s. 24, SUB-S. 2—(R.S.O. c. 127, s. 4)—EXECUTORS.

In re Pawley & London and Provincial Bank (1900) 1 Ch. 58, was an application under the Vendors and Purchasers Act. After the passing of the Land Transfer Act 1897 (60 & 61 Vict., c. 65),

which contains similar provisions to those in the Ontario Devolution of Estates Act (R.S.O. c. 127, s. 4), a testator died having devised his real estate to three trustees upon certain trusts, and he also appointed the trustees his executors. Only two of them proved the will, power being reserved to the other to come in and prove. This third executor had neither proved the will nor disclaimed the trusts thereof. The two executors who proved the will entered into a contract to sell certain real estate belonging to the testator's estate, and the purchasers required that the third executor, who had not proved, should also join in the conveyance, or that a disclaimer by him of the trusts of the will should be abstracted and produced. The other executors contended that they alone could make title, and this was the point submitted to Kekewich, J., who was of opinion that the purchasers' requisition was well founded, and although there was a power in the will expressly enabling the proving executors to sell, he nevertheless considered that the legal estate was vested in the three, and as an executor derives his title from the will, and not from the probate, the omission of the third executor to prove the will did not prevent the title vesting in him. The term "personal representatives" in the Act, in the learned judge's opinion, applies to those filling that character irrespectively of the question whether they obtain probate or not.

LEASE—COVENANT BY LESSOR NOT TO LET ADJOINING LAND FOR A SPECIFIED TRADE—LESSEE, RIGHT OF, TO ENFORCE COVENANT MADE BY THIRD PERSON WITH HIS LESSOR.

Ashby v. Wilson (1900) 1 Ch. 66, is a somewhat peculiar case. Ashby was a tenant of Wilson who also owned adjoining premises which he had covenanted with Ashby he would not let for the purposes of the same kind of trade as that carried on by Ashby. Subsequently Wilson let the adjoining premises to one Bebb, who covenanted with Wilson that he would not use the premises for carrying on a trade like that of the plaintiff's, but in breach of this covenant he actually did carry on a trade like that of the plaintiff Wilson's. The action was brought against both Wilson and Bebb, to restrain Wilson from letting the premises, and Bebb from using the premises, for the business carried on by the latter. Kekewich, J., however, held that the plaintiff was not entitled to succeed as against either defendant,—not against Wilson because he had not

been guilty of any breach of his covenant, nor yet against Bebb because as between him and the plaintiff there was no privity of contract, nor could the plaintiff require Wilson to sue Bebb for this breach of his covenant with Wilson, that point, in his opinion, being covered by *Kemp v. Bird*, 5 Ch. D. 978, notwithstanding *Fitz v. Iles* (1893) 1 Ch. 77, where *Kemp v. Bird* seems to have been overlooked.

LUNATIC—FOREIGN DOMICIL—FRENCH TUTEUR OF LUNATIC—MONEY OF LUNATIC IN ENGLISH BANK, RIGHT OF FOREIGN TUTEUR TO RECOVER.

Thiery v. Chalmers (1900) 1 Ch. 80, was an action by a lunatic by his next friend and by the tuteur of the lunatic appointed by a French court, the lunatic being domiciled in France, to recover money of the lunatic deposited in an English bank. According to French law it appeared that a tuteur of a lunatic is entitled to take possession of the whole of the lunatic's estate wherever situated, and to maintain actions on behalf thereof. The defendants were ready to pay the claim, and only desired to get a legal discharge. Kekewich, J. held that the tuteur alone was competent to give a legal discharge for the money, and he gave judgment for the plaintiffs.

WILL—CONSTRUCTION—GIFT FOR PARTICULAR PURPOSE—GIFT SUBJECT TO PERFORMANCE OF PARTICULAR PURPOSE—SURPLUS—RESULTING TRUST.

In re West, Geo ge v. Grose (1900) 1 Ch. 84, shews the marked difference between a gift in a will for a particular purpose, and a gift subject to the performance of a particular purpose. In the former case there is a resulting trust of any surplus for the benefit of the residuary devisee or legatee, if any, or if none, for the heir or next of kin, whereas in the other case the donee is beneficially entitled to the surplus. The facts in this case were as follows : A testatrix gave and devised all her real and personal estate to certain persons in trust for sale, and out of the proceeds to pay her funeral and testamentary expenses, debts and legacies. No other trusts were declared, and there was no residuary gift. The property not being exhausted by the trusts above mentioned, the question arose, who was entitled to the surplus? The trustees, or the heirs and next of kin? Kekewich, J. decided that question in favour of the heirs and next of kin.

WILL—NAME AND ARMS CLAUSE—SURNAME, USE OF.

In re Eversley, Mildmay v. Mildmay (1900) 1 Ch. 96, is a decision of Bryne, J., to the effect that where property is left by a will subject to the donee assuming the name of the testator, "alone or together with" the donee's own family name, the donee may tack the testator's surname before or after his own surname at his pleasure.

VENDOR AND PURCHASER—LAND SUBJECT TO RESTRICTIVE COVENANT—CONTINUOUS BREACH OF RESTRICTIVE COVENANT FOR UPWARD OF TWENTY YEARS—WAIVER OF RESTRICTIVE COVENANT, PRESUMPTION OF.

Hepworth v. Pickles (1900) 1 Ch. 108, was an action by a purchaser of land to obtain a rescission of the contract, on the ground that the land, the subject of the contract, was subject to a restrictive covenant against selling intoxicating liquors on the premises. The covenant was contained in a conveyance of the land to the defendant's predecessor in title made in 1874. The evidence shewed that intoxicating liquors had in fact been uninterruptedly sold on the premises for twenty-four years. Farwell, J., under these circumstances, was of opinion that there was a conclusive presumption that there had been a waiver or release of the covenant, and he dismissed the action, but without costs.

The Forum.

A CAUSERIE OF THE LAW.

CONDUCTED BY CHARLES MORSE.

Sir Alfred Milner's proclamation that the British Government will not recognize any forfeitures or incumbrances declared or created by the Transvaal Government upon property within the South African Republic since the outbreak of the war, throws a somewhat clear light upon England's post-bellum intentions. The Transvaal will undoubtedly be declared British territory. There will probably be little international difficulty as to that event being consummated; but as to European concessionaires tamely submitting to British repudiation of their claims, there is some doubt. At all events some nice questions of International Law are likely to arise in the matter. In order to justify her position England may

be obliged to establish that the declaration of war by the Boer oligarchy operates a forfeiture of its right to independent government of the state under the conventions of 1881 and 1884, and a consequent reversion of the territory to British dominion as of the date of the Kruger ultimatum. *Nous verrons.*

* * * An interesting illustration of the overwrought state of the English mind during the dark days of the Boer war is afforded by Mr. Justice Grantham's stinging comments, in his address to the grand jury at the Lancaster Winter Assizes, upon an apparently very silly sermon preached by the Dean of Durham concerning the moral attitude of the English people in the conduct of the war. It seems that the Dean had seized upon the insignificant fact that a few of the volunteers for service in South Africa, overestimating the virtues of strong waters in tempering their emotions, had, consequently, embarked in a somewhat demoralized state, to justify a violent onslaught upon the character of the British soldier and the British public in general at the end of the century. He also undertook to defend the Boers against what he termed the "slanders" of the English press. Now all this was quite foreign to the business before the Lancaster Assizes, but Mr. Justice Grantham had come to court fresh from much patriotic labour in behalf of volunteer enlistment, and the opportunity was not to be lost for chastening his friend the Dean. In the course of his strictures he said: "There might have been cases, unfortunately, where friends had forced drink too freely on their parting friends, but compared with the thousands, over the hundred thousand, who had gone out in all ranks, and in all employment, the instances were few. Intemperance in drink was a vice, but it affected the individual only; intemperance of speech and of tongue was a national crime when the words uttered would be as useful to our enemy as they were insulting to our country." This coup de maître was too much for the perfervid Dean, and he published in the press an open letter to the Judge, in which he genially observed that "it would be a very bad day for England did the judicial Bench stoop to follow your unhappy example—did the ermine descend so low as to play to the gallery in days of political or national trouble." To this Grantham, J. magnanimously rejoined: "I am very sorry for the controversy which has arisen, for I know your goodness of heart, and when political prejudices do not

arise (!) you would be the last person to say an unkind word against any one." But the matter did not end here, for the Earl of Durham asked a question in the House of Lords concerning it, and in the course of his reply the Lord Chancellor said that while he had no control over either the Judge or the Dean in this matter, he "would express his opinion as an Englishman that it was a great outrage to preach such a sermon in a church." From all of which it appears that the Dean had the worst of the argument, and we are sorry to say that he quite deserved all he got.

* * * Mr. Justice Gray, in delivering the opinion of the United States Supreme Court in the case of *The Paquete Habana* (January 8th, 1900) said that for the purpose of ascertaining the rules of International Law "where there is no treaty and no controlling executive or legislative Act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who, by years of labour, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." This "opinion" is a singularly able one throughout, and contains a very learned review of the principal authorities exempting fishing vessels from capture as prize. We are pleased to note a very complimentary reference by Judge Gray to Calvo's work on International Law, a work which may be said to have no peer among the productions of the more modern publicists.

* * * To those who are pleased to discover a parallel between Oom Paul Kruger and Oliver Cromwell, we would recommend a perusal of Lord Rosebery's address upon the occasion of the celebration of the tercentenary of the Protector's birth in London in November last—also bearing in mind the fortunes of the present war. Expressing his firm conviction that Cromwell was not a hypocrite, Lord Rosebery said: "Had he been, he could not have been such an enormous success; he could not have wielded the enormous force that he did. A religious force which is based on hypocrisy is no force at all. * * * I believe, then, that had Cromwell been a hypocrite he would not have been able to

maintain himself in the dazzling position which he achieved ; and had he been a hypocrite he could not have formed that army which he commanded, and which was indubitably the greatest army in Europe at the time of his death." And so if complete and ultimate success in a leader of men is a criterion of his honesty of purpose, then Paul Kruger is too sorry a rascal to be mentioned in the same breath with Oliver Cromwell. For further information concerning this interesting parallel read Mr. Fitzpatrick's estimate of Kruger on pp. 85, 288 of "The Transvaal from Within."

* * * What Montesquieu said of little England some hundred and fifty years ago might with equal force be applied to the sons of Greater Britain at the present crisis in Imperial affairs: "The men of this nation are more confederates than fellow-citizens." (Notes Sur l'Angleterre). Truly, the Englishman is developing new qualities with the march of years, but the fine old grain is still in the stuff whereof he is made.

* * * Sir Edward Clarke's retirement from the House of Commons is being deplored by the leading English press, notwithstanding the fact that they say of him that he is, in cricketing parlance, "an umpire who generally gives his own side out." His fine adhesion to the principle of doing what he believes to be right independent of consequence, recalls the saying of Marcus Aurelius: "Whatever anyone does or says, I must be emerald, and keep my colour."

* * * The cycle of the serious has come round upon us again. For the next decade at least we shall not let the faddists be our schoolmasters. The good old German proverb, "Allzu klug ist dumm," will be forgotten, or, if recalled, will cease to constrain us. We are to forsake the sciolism of the problem-novel, and, placing confident hand in that of the savant, go forward to explore with him the bed-rock of true knowledge. Even now we are told by the publishers that the sale of religious works exceeds that of fiction. Several important contributions to history, ethics, and speculative philosophy are in the new English catalogues ; many more are announced. So it behoves the lawyer to put on his reading-glasses at once if he wishes to keep in the van of enlightenment. He could not begin with a better book than

Professor (William) Graham's "English Political Philosophy from Hobbes to Maine," because it is both cognate to his proper professional studies and replete with data whereby he may modify and revise his, haply, rusty opinions. It is a far cry from Hobbes to Maine, and quite a number of works familiar to those who have studied law as a science are discussed more or less at length, such as those of Locke, Burke, Bentham and Mill. No one would, perhaps, be disposed to dispute Professor Graham's view that amongst English political thinkers Hobbes is "the first great fountain of original ideas," but we fear the admirers of Bentham (amongst whom we are not) will resent the rather inconspicuous place he is accorded in the learned Professor's pantheon.

Correspondence.

SUCCESSION DUTY ACT.

To the Editor, CANADA LAW JOURNAL.

DEAR SIR:—To your recent warning to the profession of this Province regarding certain provisions of The Succession Duty Act, I should like to add a word with respect to the amendments of last Session, contained in 62 Vict., c. 9, the effects of which may have escaped the notice of legal advisers of corporations. Sections 12 and 13 of the amending Act cast new and sweeping obligations upon corporations of every nature having their head offices within this Province, including banks I believe as well, to satisfy themselves that shares held by foreign owners are exempt from succession duty, or that the duty has been paid or the security for same furnished to the Treasurer of the Province, before consenting to their transfer by executors or administrators. Any omission to take these precautions before transfer, no matter how small the holding of shares may be, may impose the liability upon a corporation to pay succession duty. The provision in the 12th section by which the aggregate value of the estates of foreigners, wherever situated, is to be taken into account in ascertaining whether the portion in Ontario is subject to succession duty or otherwise, will doubtless bring within the scope of this Act many small holdings of shares heretofore exempt, as found

in *Re Renfrew*, 29 O. R., p. 565, the decision in which case is responsible for the present amendment. It appears to me that the only safe course to be followed by a corporation is to insist upon the production of letters of probate or administration issued from a Surrogate Court of this Province, accompanied by a certificate from the Treasury Department, or its properly authorized representative, shewing clearly that no succession duty is claimed upon the shares in question, and relieving the company from all liability in respect of the transfer. It would seem also that the mere following of the practice prescribed in sections 57 and 58 of the Loan Corporations Act, relating to the transfer of shares in loan companies, without taking the additional precautions mentioned, will no longer afford protection to any loan company consenting to the transfer of shares subject to duty by the executors or administrators of a non-resident.

Yours truly,

F.C.J.

To the Editor, CANADA LAW JOURNAL.

DEAR SIR:—Referring to Mr. Griffin's article in the last number of the LAW JOURNAL, I would like to suggest a question which he has not touched: Suppose the trustee, by virtue of the stock held in trust, has a controlling interest in the Company, and, therefore, power to say whether or not a bonus is to be treated as capital or income (under certain circumstances indicated by Mr. G.), and suppose he, or some member of his family, is one of the beneficiaries of the trust, what would be his liability, if any, to a cestui que trust, if he procured a disposition by the Company favourable to himself and unfavourable to the other?

J.W.C.

 REPORTS AND NOTES OF CASES.

 Province of Ontario.

 COURT OF APPEAL.

Practice.]

[Jan. 24.

McCulloch v. Township of Caledonia.

Costs—Scale of—Drainage Act—Reference.

Sec. 115 of the Drainage Act, R.S.O. c. 226, providing that the tariff of the County Court shall be the tariff of costs under that Act, applies only to actions which ought properly to have been instituted by notice under s. 93, and not to actions referred to under s. 94 which might properly have been brought at common law without reference to the Drainage Act, and which are referred to the Referee because the Court thinks they may be more conveniently disposed of by him.

J. H. Moss, for the plaintiff. *J. B. O'Brian*, for the defendants.

 HIGH COURT OF JUSTICE.

Boyd, C.]

ALLSTADT v. GORTNER.

[Oct. 28, 1899.

Statute of Limitations—Moneys in Court—Paid out by mistake—Lapse of time—Restitution—Mistake of officer of the court.

The Statute of limitations has relation only between subject and subject—the Crown cannot be bound by it.

The Court is a public trustee as to all moneys and securities in its hands.

Moneys in Court are in custodia legis—in this case tantamount to custodia regis, and to such a fund and such a custodian the Statute of limitations has no pertinence.

Suitors and claimants are not barred by any lapse of time in their application to be paid out of moneys to which they are entitled, and reciprocally they should not be protected by lapse of time from making restitution if they have improperly or fraudulently received moneys from the Court to which they had no just claim, and an order was made ordering restitution after a period of fourteen years, although without interest, as the mistake was that of an officer of the Court.

J. Hoskin, Q.C., for the motion. *E. Sydney Smith*, Q.C., contra.

Boyd, C.] PEDLOW v. TOWN OF RENFREW. [Dec. 21, 1899.

Highway—Dedication and acceptance—Registered plan—Statutory regulations—Sale of land by reference to it—Setting apart street.

A public highway may be established by dedication and acceptance.

The non-conformity to statutory regulations of a registered plan which shews a new street, may affect the right to have it treated as properly registered so as to give a new basis for description of lands sold by reference to it, but it will not affect transactions which manifest the actual setting apart and acceptance of the street on the site proposed by the co-operation of the owners and municipal authorities.

Aylesworth, Q.C., and T. W. McGarry, for plaintiffs. S. H. Blake, Q.C., and James Craig, Q.C., for defendants.

Meredith, C.J.] BARBER v. MCQUAIG. [Jan. 16.

Res judicata—Reported reasons for judgment—Premature action—Second action for same cause—Mortgagor and mortgagee—Purchaser's covenant—Assignment of—Agreement as to—Exhaustion of remedies.

A mortgagee had taken an assignment from a mortgagor of the covenant of a purchaser of the equity to pay off the mortgage and had on receiving certain securities agreed with the purchaser not to sue him until certain other remedies were exhausted and had been unsuccessful in a suit against the mortgagor on the ground that the remedies were not exhausted. In a second action on the same covenant,

Held, that the Court may properly examine the pleadings, evidence and proceedings at the trial on the former action and that the reports of the reasons given for the judgments may be looked at for the purpose of ascertaining what the law is. That the dismissal of a suit on the ground that it was prematurely brought is no bar to another action on the same demand after time has removed the objection. And in a second action that the mortgagee having exhausted her remedies and made an arrangement with the purchaser by which she was placed in the same position with respect to him as she was before she received the securities, was entitled to recover notwithstanding she had retransferred the securities to him and agreed not to sue on his covenant, but the latter agreement was not to apply to the mortgagor in case the purchaser's covenant was reassigned to him.

C. Robinson, Q.C., and W. H. Irving, for plaintiff. Aylesworth, Q.C., for defendant.

Armour, C. J.] SILLS v. COUNTY OF LENNOX AND ADDINGTON. [Jan. 16.

Criminal law—Detection of crime—Constable's services and expenses—Obtaining evidence—Payment for—Certified account—R.S.O. c. 101, s. 12.

The gist of s. 12 of R.S.O. c. 101 is to empower a Warden and County

Attorney to authorize any constable or other person to perform special services not covered by the ordinary tariff which are in their opinion necessary for the detection of crime or the capture of persons believed to have committed serious crimes, and to do so upon the credit of the County and so to render the County liable for the payment for such special services, and that whether the account is certified by the Warden and County Attorney as required by the said section or not.

Aylesworth, Q.C., and Deroche, Q.C., for plaintiff. W. G. Wilson, for defendant.

Armour, C.J.]

PARNELL v. DEAN.

[Jan. 19.

Covenant not to carry on business—Breach—Constitution of action—Goodwill—Injunction.

Three brothers, C. F. D., G. F. D. and R. D., carrying on business as bakers in the city of L., entered into an agreement with P., another baker in the same city, by which it was agreed that both businesses should be put into a Joint Stock Company, and C. F. D. was to retire, and he covenanted with G. F. D., R. D. and P. jointly not to carry on the business of baker in the said city or within ten miles of it for ten years. Subsequently G. F. D. and R. D. retired from the company, and gave up business, and two other brothers J. D. and A. D. started a new business as bakers in the said city, and C. F. D. assisted them in making and distributing bread, but as he said simply as a volunteer.

Held, 1. His so doing was engaging in the business of baker in the said city and was as much a breach of his covenant as if he had done so for hire.

2. Either the plaintiff P. or the company could maintain the action for an injunction, and that it was properly constituted by both being made plaintiffs with C. F. D., G. F. D. and R. D. as defendants.

3. It was no answer to the relief sought that G. F. D. and R. D. had ceased to carry on business and an injunction was granted.

Talbot Macbeth, for plaintiffs. I. F. Hellmuth, A. Casey and J. H. A. Beattie, for defendants.

Boyd, C., Ferguson, J., Robertson, J.]

[Feb. 7.

IRVINE v. SPARKS.

County courts—Action tried with a jury—Motion for new trial—Judgment—Appeal.

There is no appeal to a Divisional Court from a judgment of a County Court on a motion for a new trial made to that Court, in an action tried with a jury. *Brown v. Carpenter* (1896) 27 O.R. 412, followed.

Aylesworth, Q.C., for the appeal. Shepley, Q.C., contra.

Meredith, C.J., Rose, J., MacMahon, J.]

[Feb. 8.

GROVE v. BENDER.

Costs—Appeal for—Error in principle—Scale of costs—Action for price of goods sold—Refusal to accept—Re-sale pendente lite—Recovery of difference in price—Amount in controversy.

The plaintiffs brought an action in a County Court for \$175.55, the price of goods sold. The defendants had rejected the goods on the ground that they were not up to sample. After delivery of the statement of claim the plaintiffs sold the goods and delivered an amended statement of claim, in which they gave the defendants credit for the proceeds of the sale and proceeded with their action for the balance, \$77.90. The trial judge found that the goods were equal to sample, and gave the plaintiffs judgment for \$77.90. As to the costs, he held that by their amended statement of claim the plaintiffs' cause of action became an entirely new one, and solely one within the jurisdiction of a Division Court, and for this reason they were entitled only to Division Court costs, and the defendants were entitled to set off the excess of their costs incurred in the County Court.

Held, that an appeal lay to a Divisional Court, notwithstanding that costs only were involved, because the judgment appealed from shewed that the trial judge had proceeded upon a wrong principle.

Held, also, that the plaintiffs, having properly brought their action in the County Court, should not be deprived of their costs of such action by what they had done pendente lite, and were entitled to costs on the County Court scale.

Worrell, Q.C., for plaintiffs. *Vickers*, for defendants.

Armour, C.J., Falconbridge, J., Street, J.]

[Feb. 12.

TRUSTS AND GUARANTEE CO. v. HART.

Gift—Parent and child—Fiduciary relationship—Influence—Presumption—Onus—Absence of independent advice.

For fifteen years before his father's death the defendant managed his father's shop and his business generally, and did all his banking business under a power of attorney. For eleven years before the death the defendant and his wife and children all lived with the father in a dwelling above the shop. The fullest authority was given to the son and the fullest trust reposed in him. After the death of the father, at the age of seventy-eight, in September, 1898, the son claimed a sum of \$20,000, represented by a bank deposit receipt dated 3rd of June, 1898, payable to himself, which he alleged was a gift from his father to himself or his children. He obtained the deposit receipt by drawing a cheque for the amount in his own favour upon his father's account and signing it with his father's name, by virtue of the power of attorney. The father died intestate, leaving the defendant

and two other children. The sum of \$20,000 represented more than one-fourth of the value of the estate. The trial judge found that the \$20,000 was a gift to the defendant's children and ordered it into Court for their benefit.

Held, reversing that judgment, that, on grounds of public policy, the presumption was that the gift, even though freely made, was the effect of the influence induced by the confidential relationship which existed, and the onus was on the defendant to shew that his father had independent advice, or adopted the transaction after the influence was removed, or some equivalent circumstances; and nothing of the kind was shown in this case. *Morley v. Longhoran*, (1893) 1 Ch. 736, *Rhodes v. Bate*, L.R. 1 Ch. 252 and *Liles v. Terry*, (1893) 2 Q.B. 679, followed.

The rule is not confined to the case of trustee and cestui que trust, but has been applied to every case where confidence has been reposed, and the fact that the benefit obtained has not been so obtained for the personal benefit of the person in whom the confidence was reposed, does not affect the application of the principle.

Evidence was given to the effect that the deposit receipt was taken in the defendant's name in lieu of a promissory note made by the father in 1895, which itself was a renewal of an earlier note made in favour of the son as a settlement for his children, and that both notes had been destroyed.

Held, that the notes, if they existed at all for the purpose alleged, were incomplete gifts, not binding upon the deceased or his estate. The hand by which the transfer of the \$20,000 was effected was that of the son, and the ratification rested almost wholly upon the evidence of the son and his wife, who kept the matter a secret until after the death. The father at the time the transaction was carried out in June, 1896, was not legally bound to pay his note; he was ill and old; and the only adviser to whom he had recourse was the defendant. Therefore that time, and not the time when the notes were said to have been given, was the time at which the gift must be taken to have been made, if at all, and at which the effect of the lack of the independent advice was to be considered.

Osler, Q.C., and *E. M. Young*, for defendants. *Aylesworth*, Q.C., and *C. H. Widdifield*, for defendant George D. Hart and infant defendants. *R. Wardrop*, for Standard Bank of Canada.

Meredith, J., Rose, J., MacMahon, J.]

[February 15.

CANADIAN MUTUAL L. & S. CO. v. NISBET.

Receivership order—Life policy—Assignment of same—Security for money
—R.S.O. c. 77, s. 18.

Held, that the plaintiffs were entitled to a receivership order to receive the defendant's interest in a life ten-payments policy which was fully paid

up—the same having been assigned to the plaintiffs as security for a debt due to them, and the assignment entitling the defendant to receive from time to time the cash surrender value of the bonus additions to the policy, and so having ceased to be exigible in execution under R.S.O. c. 77, s. 18, as “a security for money”—on the principle that the benefit of the defendant’s interest in the policy under ordinary process being defeated by a prior title—that of his assignee—not extending to the whole interest of the defendant in the property upon which the judgment was proposed to be executed—the plaintiffs were entitled to the aid of the court to enable them to reach it.

Macdonell, for the plaintiffs. *J. H. Moss*, for the defendant.

Ferguson, J.] *COLE v. CANADIAN PACIFIC RAILWAY COMPANY* [Feb. 16.

Evidence—Discovery—Negligence—Absence of safeguards—Subsequent placing.

Where an injury is alleged to have been caused by the negligence of the defendant in not furnishing proper safeguards at some place of danger, evidence of safeguards placed there by him after the injury is not admissible for the purpose of shewing his prior negligence; and upon an examination for discovery the defendant is justified in declining under advice to answer questions relating to such subsequent placing.

D. L. McCarthy, for plaintiff. *Shirley Denison*, for defendants.

Meredith, C.J., Rose, J., MacMahon, J.]

[Feb. 19.

LEES v. OTTAWA & NEW YORK R.W. CO.

Railways—Tolls not fixed by Governor-General—Threefold penalty—Right to receive back—51 Vict., c. 29, s. 227.

The fact that a railway company has not had its tolls approved by the Governor-General under 51 Vict., c. 29, s. 227, does not in itself entitle a passenger who has paid such tolls to recover three times the amount under s. 290 of that Act, in the absence of evidence that the fares charged were unreasonable or excessive; nor is such passenger entitled to recover back the amount so paid by him as paid under a mistake of fact, where it is such as in equity and conscience he ought to have paid.

Plaintiff in person. *W. H. Curle*, for defendants.

Armour, C.J.] *MOKE v. TOWNSHIP OF OSNABRUCK.*

[Feb. 26.

Costs—Scale of—Drainage Act—Reference.

Where an action is brought to recover damages for injury to property by the construction of drainage works, and the claim is within the scope

of s. 93 of the Drainage Act, R.S.O. c. 226, under which proceedings before the Drainage Referee may be taken without bringing an action, and an order is made referring the action to the Referee for trial, the costs should be taxed according to the tariff of the County Courts, under s. 113.

J. H. Moss, for the plaintiff. *Cattanach*, for the defendants.

Meredith, C. J., Rose, J., MacMahon, J.]

[March 1.

UNION BANK OF CANADA *v.* RIDEAU LUMBER CO.

Appeal—Abandonment—Reinstatement—Grounds for leave to appeal—Judgment—Error—Injustice.

The defendants, after setting down an appeal for hearing by a Divisional Court, served notice abandoning it, and the case was struck out of the list. They afterwards moved to have it restored to the list.

Held, that if the motion could be treated as one for leave to appeal, notwithstanding the lapse of time, it would be incumbent upon the applicants to shew that *prima facie* the judgment below was wrong; and there being no error apparent on the face of the judgment, and no specific error having been pointed out, such an application must be refused. But, *semble*, the motion could not be so treated.

The judgment below found that the defendants were trespassers and directed a reference as to damages. When the appeal was abandoned the defendants thought the claim of the plaintiffs would be much smaller than it subsequently appeared to be; and on learning the size of the claim, the defendants wished to renew their appeal.

Held, no ground for interfering.

The defendants had not made out any case shewing that any injustice was likely to arise if they were not allowed to appeal, or that they were only asking for what was just.

Aylesworth, Q. C., for defendants. *W. H. Douglas*, Q. C., for plaintiffs.

Meredith, C. J., Rose, J., MacMahon, J.]

[March 1.

RE WOOLIVER AND THE COUNTY OF KENT.

Public schools—County Council—Appointing arbitrators—An appeal from Township Council—Discretion—Mandamus—R.S.O. c. 292, s. 39, s-s. 3.

The provisions of s-s. 3 of s. 39 of the Public Schools Act, R.S.O., c. 292, are permissive not imperative.

It is plain from a review of the history of the legislation as to the matter with which that section dealt, that the legislature in 1897 deliberately abandoned the policy of making it obligatory upon the County Council to

appoint arbitrators, and plainly vested in the County Council the discretion of appointing them or not as it might in the exercise of that discretion deem proper. Judgment of ARMOUR C J., reversed.

Aylesworth, Q.C., for the appeal *John S. Fraser, contra.*

Street, J.]

ALLISON v. BREEN.

[March 4.

Limitation of actions—Judgment—Revivor—Time—Notice.

In 1894 the plaintiff obtained *ex parte* (the defendant being out of the jurisdiction) an order reviving a judgment for the payment of money which he had recovered against the defendant in 1875, and allowing the entry of a suggestion on the judgment roll, and the issue of execution. The plaintiff entered the suggestion in 1894, and afterwards examined the defendant as a judgment debtor, whereupon the defendant made an offer of settlement, which was not accepted. The plaintiff died in 1895 and the defendant in 1899, after which the personal representative of the plaintiff obtained an order on praecipe reviving the action in his name as plaintiff and in that of the personal representative of the defendant as defendant.

Held, that the last order should have been made on notice, but it was proper to treat an application to set it aside as a substantive motion on notice, and, so treating it, the order should be confirmed.

The order made in 1894 reviving the judgment should have been made on notice, under the Common Law Procedure Act, then in force, but, under the circumstances of the defendant's absence from the country, his subsequent examination, and the attempted settlement, it was a valid and binding order.

Held, also, following *Mason v. Johnston*, 20 A.R. 412, that the judgment remained in force for twenty years, and the entry of the suggestion within that time was effectual to renew the time from which the statute begins to run.

Tytler and C. J. McCabe, for defendant by revivor. *J. J. MacLennan*, for plaintiff by revivor.

Meredith, C.J., Rose, J., MacMahon, J.]

[March 5.

WINDSOR FAIR GROUNDS AND DRIVING PARK ASSN. v. HIGHLAND PARK CLUB.

Parties—Third party notice—Agreement—Rule 209—Appearance.

The plaintiffs' claim against the defendants was for the balance of a sum agreed to be paid for the hire of a race track. The defendants alleged that a ferry company had agreed to pay and contribute towards the hire of

the track a certain sum for each day of the race meetings, in consideration of the increased travel, and that the defendants had thereby been induced to enter into the agreement with the plaintiffs.

Held, that this allegation was not sufficient to support a claim against the ferry company for contribution, indemnity, or any other relief over, within Rule 209, and therefore the defendants should not have been allowed to serve a third party notice.

Held, also, that the proper practice in moving against a third party notice is to move without entering an appearance.

Aylesworth, Q. C., for ferry company. *F. A. Anglin*, for defendants.

Meredith, J.]

ROMBOUGH v. BALCH.

[March 6.

Appeal—Supreme Court of Canada—Security for costs—Stay of proceedings—Payment of money out of Court.

At the trial the plaintiffs recovered judgment in the High Court against the defendants for damages and costs. The defendants appealed to the Court of Appeal, paying \$200 into Court as security to the plaintiffs for the costs of such appeal. The appeal was dismissed with costs. The defendants launched a further appeal to the Supreme Court of Canada, and gave the security required by s. 46 of the Supreme and Exchequer Courts Act, but no other security.

Held, that proceedings to enforce the plaintiffs' judgment in the High Court were not stayed, either by force of s. 48 or otherwise.

But the Court was not bound to pay out immediately to the plaintiffs the sum of \$200 paid in by the defendants, the judgment of the Court of Appeal being stayed pending the appeal to the Supreme Court, which might determine that the plaintiffs were not entitled to the costs of the Court of Appeal.

And in this case the money ought not to be paid to the plaintiffs, from whom it could never be recovered, and whose solicitors declined to take it upon the usual undertaking, but should remain in Court during the pending appeal.

J. H. Moss, for plaintiffs. *W. H. Blake*, for defendants.

Armour, C. J.]

SPEARS v. FLEMING.

[March 12.

Summary judgment—Rule 603—Recovery of land—Money claim—Counterclaim—Trial.

The defendant having entered into possession of land which he had contracted to purchase from the plaintiffs, and having, as alleged, made default in payments of instalments of the purchase money, the plaintiffs brought an action against him to recover possession of the land and also for a money demand. The writ of summons being specially indorsed,

and the plaintiffs having moved for summary judgment under Rule 603, the defendant set up that he had been induced to enter into the contract by fraud and misrepresentation, for which he intended to counterclaim, and that nothing was due to the plaintiffs in respect of their money demand. The Master ordered judgment for the recovery of the land, but stayed the operation of it until after judgment upon the plaintiffs' other claim and the defendant's counterclaim, which he allowed to go to trial.

Held, reversing this order, that many serious questions might arise at the trial as to the recovery of the land and the terms upon which it might be recovered, and the trial judge ought not to be hampered with a final judgment for the recovery of the land in adjudicating upon the questions likely to arise upon the trial of the action.

J. H. Moss, for plaintiffs. *Lindsey, Q.C.*, for the defendant.

Armour, C. J., Street, J.] PICKARD v. TIMS.

[March 13.

Costs—Scale of—County Court—Defence arising after action—Discharge of part of claim—Division Court garnishment—Payment into court.

On the 5th August, 1899, a creditor of the plaintiff issued a summons out of a Division Court claiming \$64 from the plaintiff, and claiming to attach moneys in the hands of the defendant, as garnishee, to answer the plaintiff's debt, and served it on both primary debtor and garnishee on the day of its issue. On the 17th August this action was brought in a County Court to recover \$133.40. On the 28th August the garnishee (the defendant in this action) paid \$57.50 into the Division Court. On the 6th September judgment was given in the Division Court for the primary creditor against the primary debtor (the plaintiff in this action) for \$64 and against the garnishee for \$57.50. On the 5th October the plaintiff delivered his statement of claim for the whole \$133.40.

Held, that the service of the summons was no bar to this action; that the defence that the defendant was discharged as to \$57.50 by his payment into the Division Court was a defence which did not arise until the payment was made and judgment given in the Division Court, and was consequently a defence arising after action brought, and such payment and judgment could not have relation back to the time of service of the summons; and, therefore, it having been adjudged in this action that the plaintiff was entitled to the amount claimed by him, less the \$57.50, the action was properly brought in a County Court, and the plaintiff was entitled to costs on the scale of that court.

Jackson, Q.C., for the plaintiff. *Shepley, Q.C.*, for the defendant.

Armour, C. J.]

[March 14.

ANGLO-CANADIAN MUSIC PUBLISHING ASSOCIATION v. SOMERVILLE.

Costs—Infringement of copyright—Consent judgment—Damages—Amount of—Reference—Offer—Payment into Court.

Where judgment was pronounced by consent declaring that the defendant had infringed the plaintiffs' copyright, restraining him from continuing to infringe, and directing a reference to ascertain the damages sustained by reason of the infringement, and the Master found that the damages were only \$6.70, and also reported specially that the plaintiffs were aware before action that the defendant was willing to hand over all copies of and to stop selling or giving away the publications in question, but the plaintiffs demanded \$100 compensation, and that after action the defendant offered to pay \$25 for damages and costs and to deliver up any of the publications on hand and to give an undertaking that there would be no further infringement, but the plaintiffs did not accept the offer.

Held, that the plaintiffs were entitled to the costs of the action. *Cooper v. Whittingham*, 14 Ch. D. 501, *Upmann v. Forester*, 24 Ch. D. 231, and *Wittman v. Oppenheim*, 28 Ch. D. 260, followed. And also to the costs of the reference, the defendant not having when consenting to judgment offered to pay a fixed sum for damages and to pay it into Court.

Laing, for plaintiffs. *W. Roaf*, Q.C., for defendant.

Province of New Brunswick.

SUPREME COURT.

En Banc.]

MACPHERSON v. MOODY.

[Feb. 9.

Chattel mortgage—Right of mortgagor to trade—Whether words, "To use same in ordinary way" authorizes trading—Replevin.

Defendant, a farmer, executed a mortgage on his farm and a chattel mortgage on his stock of horses, cattle, sheep, etc., farming implements and all his personal property, as security for a loan, which mortgages were duly registered. The chattel mortgage was in the usual form, transferring all the chattels specified in a schedule and "all other property that may hereafter . . . be bought to keep up the same, in lieu thereof and addition thereto either by exchange, purchase or otherwise," and containing the ordinary proviso allowing the mortgagor to remain in possession of the chattels "with power to use same in the ordinary way while so in possession," and also a proviso prohibiting the disposal of the chattels without the written consent of the mortgagee. Subsequently he traded one of the horses, A, with plaintiff without informing him of the existence of the

mortgage, receiving in exchange another horse, B. Plaintiff some months later learned of the mortgage, and, tendering the horse A back to the defendant, demanded that the bargain be rescinded. Defendant refused, claiming that he had the permission of the mortgagee to trade and subsequently the mortgagee's solicitor telephoned to plaintiff offering to give him a release. Plaintiff insisted on a rescission of the trade, and this being declined, he replevied the horse B. The County Court Judge on the trial of defendant's claim of property, held that the horse had legally passed to defendant and ordered its delivery back to him.

Held, on appeal, per VANWART and McLEOD, JJ., that under the terms of the mortgage defendant had no right to trade without the written consent of the mortgagee and that plaintiff was entitled to recover back his horse.

Held, per BARKER and LANDRY, JJ., that there being an implied warranty by defendant to plaintiff of his right to exchange, in the absence of evidence shewing a ratification of the trade by the mortgagee before plaintiff's election to rescind, plaintiff was entitled to recover back his horse unless it should be found as a matter of fact that to trade horses was in the ordinary course of defendant's business as a farmer, and the transaction should thereby be brought within the proviso "with power to use same in the ordinary way," and that the judge below, not having definitely passed on this question, there should be a new trial.

TUCK, C.J., and HANNINGTON, J., held that the evidence shewed authority in the defendant to exchange, and that plaintiff was not entitled to recover back the horse, B.

Appeal allowed with costs with directions for new trial.

C. E. Duffy and Wm. Pugsley, Q.C., in support of appeal. *A. J. Gregory, contra.*

En Banc.]

EX PARTE LANDRY.

[Feb. 9.

Several convictions—Rule nisi for certiorari—Leave to take out jointly or severally—Joint rule bad.

In Michaelmas term applicant moved for rule nisi for certiorari to remove several convictions for assault against him and others, the motion being in the alternative to take out a separate rule against each conviction or a joint rule against all jointly, as he should decide. The motion being granted he subsequently took out a joint rule against all the convictions.

Held, on motion to make the rule absolute, that a separate rule should have been taken out in each case.

Rule discharged.

M. G. Teed, in support of rule. *J. D. Phinney, Q.C.*, contra.

Province of Manitoba.

QUEEN'S BENCH.

Full Court.]

MOIR v. PALMATIER.

[Feb. 8.]

Vendor and purchaser—Rescinding agreement of sale—Specific performance—Formal declaration of cancellation—Laches.

Judgment of KILLAM, C.J., noted vol. 35, p. 509, affirmed with costs.

Held, also, per RICHARDS, J., that the laches of the plaintiff barred her from the remedy of specific performance against the defendant Mills, who had entered into possession of the property under a lease from Palmatier, with an option of purchase, and had made valuable improvements without notice that the plaintiff intended to claim specific performance.

Culver, Q.C., and *Pitblado*, for plaintiff. *Ewart*, Q.C., and *Hough*, for defendant Palmatier. *Huggard*, for defendant Mills.

Full Court.]

MERCHANTS' BANK v. MCKENZIE.

[Feb. 8.]

Fraudulent conveyance—Exemptions—Real Property Act, R.S.M. c. 133, s. 57—Burden of proof—Concealed fraud—Laches.

The plaintiffs were judgment creditors of the defendant McLean, who at the time judgment was recovered was, and has since remained, in insolvent circumstances; and this action was brought to have it declared that two quarter sections of land which were bought after the recovery of the judgment in the name of the defendant McKenzie were held by her as a bare trustee for McLean, or had been fraudulently transferred to her in order to hinder and defeat the creditors of McLean. Both parcels of land had formerly belonged to McLean, but they had been sold for arrears of taxes in 1886, and subsequently the purchasers, after negotiations carried on by McLean or his solicitor, assigned the tax sale certificate to the defendant McKenzie, a poor girl, who lived with McLean, her uncle. Tax deeds were issued to her by the municipality, and certificates of title under the Real Property Act, were obtained for both parcels in Miss McKenzie's name. She claimed that she had furnished the money, \$125, required to acquire the tax sale certificates, but the evidence in support of this was not satisfactory to the court which held that the onus was upon her to establish the fact by clear and convincing proof and the additional sum, about \$125 more required to complete the purchases and procure the certificates of title was not provided by her.

After the purchase, the charge and management of the lands were left wholly in McLean's hands, and Miss McKenzie had never received any rents or exercised any rights of ownership except that she agreed to a

suggestion that her cousin, McLean's son, made to her some seven or eight years ago, that she should rent them to him. But no terms were discussed and he had paid her no rent. The evidence also shewed that the defendant McLean had himself cultivated and managed the farms for his own benefit, and had in fact always dealt with the lands as if they were his own, but in his evidence at the trial he stated that he had been working for his son in cultivating the land.

Held, 1. The plaintiffs were entitled to the relief asked for, and that section 57 of the Real Property Act, R.S.M. c. 133, as amended by 55 Vict., c. 38, s. 4, does not prevent the granting of the relief as it provides that a certificate of title is "subject to the right of any person to shew fraud wherein the registered owner has participated or colluded," and the law declares that such a transaction as was held to have been proved is fraudulent under 13 Eliz., c. 5, and Miss McKenzie participated in it. *Barrack v. McCullogh*, 3 K. & J. 117; *Merchants' Bank v. Clark*, 18 Gr. 594; *Harris v. Rankin*, 4 M.R. 129, and *Re Massey and Gibson*, 7 M.R. 172, followed.

2. Laches could not be attributed to the plaintiffs as the fraud was a concealed one, and without any want of reasonable diligence they only became aware of the facts about eighteen months before the commencement of the action.

3. The defendant McLean in view of the evidence given by himself at the trial was not entitled to claim any part of the lands as exempt from seizure and sale.

Appeal from decision of KILLAM, C.J. at the trial dismissed with costs.

Tupper, Q.C., and *Phippen*, for plaintiffs. *Ewart*, Q.C., and *McPherson*, for defendants.

Full Court.]

DOIDGE v. MIMMS.

[Feb. 9.

Married woman—Notice by administrator disputing claim—R.S.M. c. 146, s. 31—Wife suing for personal services—Corroboration in suit against estate of deceased—Joinder of parties.

Appeal from the judgment of a County Court.

The original plaintiff was a married woman who sued the administratrix of one Kingdon deceased for nursing him in his last illness and for meals supplied to other nurses during that period.

The deceased had his domicile in Manitoba, and had boarded and lodged at the house of the plaintiff's husband for about nine years, during which the plaintiff did the ordinary household work. At the trial the plaintiff swore that there had been a special bargain between her and deceased about the nursing and that he had promised to pay her for it, but there was no corroboration of her testimony on this point. Objection

having been taken at the trial as to the plaintiff's right to sue alone, her husband was allowed to be joined as co-plaintiff. The defendant had first taken out letters of administration in Ontario, but in June, 1898, became administratrix here by the re-sealing of the original letters pursuant to the Surrogate Courts Act. Previous to this the defendant had distinctly disputed the plaintiff's claim, and the action was not commenced until June, 1899.

The County Court Judge dismissed the action on the ground that it had not been brought within six months after the claim had been disputed as required by s. 31 of R. S. M. c. 146.

Held. 1. The action should not have been dismissed on such ground, as the defendant, at the time the dispute was made, had no locus standi in this province.

2. If a special contract as to the nursing had been made the wife could sue for it alone. *Young v. Ward*, 24 A.R. 147, distinguished.

3. Unless the special contract alleged by the wife was proved, both claims could have been sued for by the husband only, and if it were held to be proved, the claim for nursing would belong to the wife alone, so that in either case the husband should not have been joined with his wife in the suit.

4. Whilst the evidence of a claimant against the estate of a deceased person should be clear and convincing and if uncorroborated will not be readily acted on, there is no absolute rule of law requiring corroboration in this province: *In re Garnett*, 31 Ch. D. 1; *In re Hodgson*, 31 Ch. D. 177.

The plaintiff was allowed a new trial at her option, otherwise appeal to be dismissed. No costs of the appeal to either party.

Heap, for plaintiff. *Hull*, for defendant.

Full Court.]

IN RE HUGGARD.

[Feb. 9.

Costs—Taxation—Solicitor and client—Agency terms to foreign solicitor.

Decision of DUBUC, J., noted ante vol. 35, p. 651, varied on appeal by holding that the amount sent to the Toronto solicitors for their half (on agency terms) of the fees charged should not be treated as having been paid to the company, and that the Winnipeg solicitor should not be credited with the amount in taking the accounts between him and the company.

Appeal allowed with costs.

Huggard, for the solicitor. *Mulock*, Q.C., for the clients.

Province of British Columbia.

SUPREME COURT.

Irving, J.] OPPENHEIMER v. SPERLING. [Oct. 22, 1899.

Practice—Service out of jurisdiction—Agreement to transfer shares in a British Columbia Company—Order XI.

An *ex juris* writ having been issued to enforce an agreement between residents of British Columbia and England for transfer of shares in a provincial company not in terms providing for its performance within the jurisdiction. *Held*, that the writ should be set aside.

Bodwell, Q.C., and *A. E. McPhillips*, for the motion. *Wilson*, Q.C., and *Marshall*, contra.

Irving, J.] PAVIER v. SNOW. [Dec. 22, 1899.

Mining law—Adverse claim—Staking—Admissibility of documents—R.S. B.C. 1897, cap. 135.

In adverse proceedings where it is not established with reasonable certainty; (1) that the ground was properly staked; (2) that assuming the ground had been properly staked, it was identical with the ground mentioned in the record, and the defendant shews title and produces certificates of work for several years, judgment will be given in favour of defendant.

Before a substituted certificate will be admitted in evidence there must be proof of loss of the original. A certificate of a Mining Recorder given under section 98 can be received in evidence without ten days' notice under the Evidence Act.

Nelson, for plaintiff. *MacNeill*, Q.C., for defendant.

Martin, J.] ROGERS v. REED. [Jan. 16

Practice—Security for costs of appeal—Amount of.

Summons for security for costs of an interlocutory appeal from an order of a local judge under Order XIV. The question was as to the amount. After conferring with the other judges, MARTIN, J. decided that for the future, so far as he was concerned, security would be ordered (except in exceptional cases) as follows: (1) Appeals, generally, \$150. (2) Appeals, interlocutory, from both Supreme and County Courts, \$75. (3) Appeals, County Court, \$100.

Barnard, for plaintiff. *Lawson*, for defendant.

McColl, C.J.] BURKE v. B.C. ELECTRIC RAILWAY CO. [Feb. 5.
*Railway—Regular station—Personal injury to passenger alighting—
 Negligence—Omission or nonfeasance.*

Action by plaintiff against the British Columbia Electric Railway Company, Limited, to recover damages for an injury sustained in alighting from a car operated by defendant company between the cities of Vancouver and New Westminster. Special tickets at reduced rates were issued by the defendant company to persons living along the line, and one was held by W. limited to the use of himself and the members of his family between Vancouver and Central Park Station. The plaintiff who lived in Vancouver, went to visit the W.'s, travelling as was her custom, on W.'s ticket although not a member of the family. W. lived beyond Central Park Station, and the company gratuitously and for her own convenience carried the plaintiff some four hundred yards farther along, where she was allowed to alight. At this place the ground was not level, and a person living along the line had been permitted for his own convenience to lay down on the right of way a platform, one end of which rested on the ground and the other upon a plank. The plaintiff descended safely to the platform, but in passing from it she fell and was injured, owing as alleged to some defect in the condition of the plank supporting it.

Held, that the company was not liable. Judgment for defendant with costs.

Hagel, Q.C., and *A. D. Taylor*, for plaintiff. *Martin*, Q.C., for defendant.

Drake, J.] [Feb. 17.
 HALL v. THE QUEEN AND THE KASLO & SLOCAN RAILWAY COMPANY.
*Petition of right—Crown lands—Kaslo and Slocan Railway Subsidy Act
 and Amending Acts.*

Petition of right praying that the Crown grant of lot 873, Group 1, Kootenay District, said to contain 428 acres, dated 21st March, 1898, to the Kaslo and Slocan Railway Company be declared null and void, and that a Crown grant of the said lot be issued to the petitioner upon his paying the purchase price to the Province of British Columbia.

Under the Kaslo and Slocan Railway Subsidy Act, 1892, it was declared lawful for the Crown under certain stated circumstances to issue to the Railway Company lands "not containing areas of less than one mile square." For the suppliant it was contended that it was incompetent for the Crown to grant any lands to the company under its subsidy Act in less quantities than a mile square, and also that the grant to the company was illegally and improperly issued, as it did not contain the provision of s. 32 of the Land Act, R.S.B.C. 1897, c. 113, viz.: a reservation of a quarter interest in town sites and also that there was no reservation of the timber.

Held, dismissing the petition, that the suppliant had no locus standi to obtain any relief.

Hunter and Walls, for suppliant. *Maclean*, D. A.-G., for the Crown. *Bodwell*, Q.C., and *Duff*, for the Railway Company.

Obituary.

John Juchereau Kingsmill, Q.C., D.C.L., whose death at sea on his way to Europe was briefly referred to in our last issue, was the son of the late Lieut.-Col. Kingsmill of Niagara. This distinguished officer had four sons who came to manhood, Henry, captain in the Royal Canadian Rifles, who died at Prescott, Ont.; Charles Edward, lieutenant in the Ceylon Rifles, who died in Ceylon, and Nicol Kingsmill, Q.C., of Toronto, one of the most respected and deservedly popular members of the Bar of Ontario. Col. Kingsmill went through the Peninsular war with his regiment, the gallant 66th. At Albuera they went into action with 540 bayonets, but next morning only 53 were on parade; whilst at Maiwand, India, the regiment was almost obliterated. Col. Kingsmill after the war came to Canada as A.D.C. and private secretary to Lord Seaton, and was subsequently appointed sheriff of Niagara. The subject of this sketch was born May 21, 1829, and educated at Upper Canada College, in the welfare of which he always took a lively interest. He was a B.A. of old King's College, graduating with honours in 1849, M.A. of Trinity in 1856, and a D.C.L. in 1863.

In 1852 Mr. Kingsmill was called to the Bar of Ontario, commencing the practice of his profession in the town of Guelph. Six years afterwards he was appointed County Attorney of Wellington. In partnership with the late Adam Johnston Ferguson, Q.C., formerly Judge of that District, he soon acquired a large and influential clientage, whose respect and good-will he won and kept, and whose business he conducted with great energy and success. The writer, as one of his students at that time, is glad to have an opportunity of bearing testimony as well to the benefits derived from a legal training in such an excellent school as to the genial hospitality, the warm and helpful friendship, and the uniform courtesy which were marked features of his character. After the retirement of the Hon. Ferguson Blair, as his partner was subsequently known, Mr. Kingsmill was joined by Mr. Donald Guthrie, who still continues the business.

In November, 1866, he retired from active practice and was appointed County Judge of the County of Bruce, which position he held until 1893, when he removed to Toronto, entering his brother's firm of Kingsmill, Saunders & Torrance. Both at the Bar, on the Bench and as a private

citizen Mr. Kingsmill occupied a high position. The soul of honour, genial and courteous, he enjoyed the confidence and warm esteem of all those with whom he came in contact. He was four times married. His first wife was the eldest daughter of Sheriff Grange, his son of that marriage being Charles Edmund Kingsmill, now a captain in the Royal Navy.

An eloquent tribute to the memory of the deceased was paid by Dr. Parkin, principal of Upper Canada College, the purport of which is as follows: "He had been a pupil in the college from 1840 to 1847, and his loyalty to his old school was unbounded. He had taken the chairmanship of the board at a very critical time in the history of the school; had freely given his time, thought and experience to the work of extricating the college from the difficulties in which it was involved. His name will always be held deservedly in honour among old Upper Canada College boys. His unfailing courtesy and refined feeling has always shown itself in all his relations to the staff of the college. Himself a typical gentleman of the old school, he took the deepest interest in the tone and character of the college, and both masters and boys had the greatest reason to do honour to his memory."

Book Reviews.

The Indian Review, Vol. I, No. I., January 1, 1900. G. A. Natesaw & Co., Publishers, Madras.

Coming from the antipodes we make room to refer to the above monthly magazine which has just reached us. The war in South Africa at present is naturally such an all engrossing topic that the nation seems to have little interest in anything else, and may for the moment forget that the great value of our colony in the southerly end of the Dark Continent, at least up to the present time, lies in the fact that it is a necessity for the maintenance of our Indian possessions; and it may be that in a very short time our attention may be transferred from Africa to India.

A perusal of the many interesting articles in this most readable magazine gives further evidence of the greatness and far reaching character of the Great Empire to which we belong. It begins with a concise resume of the progress of the Transvaal war, and in another place gives the most intelligent and concise sketch of its origin and antecedent events that we have met with. Considerable space is given to a well-written review by an English educated Indian of Mr. Dutt's spirited translation of that ancient and famous epic of India, *The Ramayana*. For the Indian lawyer there is an article on the alienation of land in the Punjab, and notes of cases of general interest recently decided in the Courts of the above possessions.

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The war seems to be disturbing things in England in judicial as well as in other circles. The Bar Council objects to the appointment of Lord Justice Collins to inquire into the administration of the Patriotic fund and speaks of the "increasing practice of appointing Judges to perform duties outside, and often inconsistent with, those attaching to their judicial position, as contrary to the public interest." The *Law Journal* refers to this in a skit entitled : "The New Zealander at the Law Courts," which he finds devoid of Judges, and is told by the "ancient attendant" that some of them have gone to settle disputes in the Cornwall Herring Fishery, another to help the Speaker add up a column of figures in the House of Commons, and the rest to South Africa, to charge Grand Juries on war subjects, and to clear the jails filled by Kitchener; whilst the *Law Times* formulates what it believes to be the voice of the profession in England on the subject as follows :

"1. It is desirable that judges should be absolutely independent of the Executive. (a) To keep them free from possible political entanglements. (b) To keep them free from invidious advantages by placing the Executive under an obligation to the individual judge .

2. That a judge's time is already bought by the nation on behalf of suitors in the courts, and that additional labours ought not to be imposed upon him even though capable of being carried on when the courts are not sitting.

3. That if a judge is, under any circumstances, to be asked to assist the Executive, those circumstances ought to be such as to leave the Executive no alternative but to require the services of a judge. This means that the inquiry involved shall be one for which a president is required of high judicial training—indeed, in which a president so qualified is absolutely indispensable."

It seems to us that it would be a pity that the services of men occupying judicial positions should not under some circumstances be available for matters outside their judicial duties, but if they are so called away it is clear that their places should be so filled that the public should not suffer by causes being left unheard and undisposed of.

NEGLIGENCE IN RELATION TO PRIVACY OF CONTRACT.

[This article is being published simultaneously in the *ENGLISH LAW QUARTERLY REVIEW* and the *CANADA LAW JOURNAL*.]

I. It is sufficiently obvious that, from a purely logical standpoint, the natural and probable consequences which the common law declares to be the measure of a man's liability for a negligent act include the likelihood that a certain individual will be injured as well as the likelihood that he will be injured in a certain manner. If therefore the courts had carried out that doctrine consistently, the question whether the plaintiff was one of those persons to whom the duty of exercising reasonable care was owed by the defendant would be decided by the same standard as the question whether there is a causal connection between the given breach of that duty and the physical changes which constituted the injury in suit. That is to say, the issue proposed would be, whether the defendant ought, as a man of ordinary sense and intelligence, to have seen that, if he should be careless in respect to the given subject matter, persons coming within the same category as the plaintiff would probably suffer damage.

In the countries where the common law is administered, however, the course suggested by these obvious considerations has not been pursued. It is true that the courts, in dealing with one large class of cases, viz., those in which the injury was the direct result of the use of an agency which was under the immediate control of the defendant at the time when the plaintiff was damaged by it, have naturally and perforce worked out a theory of liability which confers a right of action upon the same classes of persons as would have that right if the test of reasonable anticipation had been consciously applied. Under no conceivable scheme of juridical responsibility could a defendant be heard to allege that a person who was, as a matter of fact, injured by reason of his contact with or proximity to real or personal property which the defendant then controlled, was not one of those persons whom a reasonable man would have expected to suffer injury from such contact or proximity (*a*). The applicability of the fundamental

(*a*) See *Elliott v. Hall* (1885) 15 Q.B.D. 315, where this point is clearly brought out. It was laid down in a recent case by Lord Justice Rowen that, "if the owner of premises knows that his premises are in a dangerous condition, and that people are coming there to work upon them by his own permission and

principle, *Sic utere tuo, ut alienum non laedas*, is here so manifest that there is no room for controversy as to the extent of responsibility (b). But in the cases where this element of control cannot be treated as a determinative factor—the cases, that is to say, whose common distinctive feature is the circumstance that the plaintiff has been injured through the negligence of other parties in respect to a transaction to which he was a stranger—it is only very recently, and to a very limited extent, that judges have shewn any willingness to determine the question whether the plaintiff was one of those persons to whom the defendant owed a duty to use care upon a theory which would ascribe a proper weight to the doctrine of probable consequences. (See XII. post.) This disregard of a fundamental principle has borne its natural fruit in a series of decisions which furnish as deplorable illustration as can be mentioned of the characteristic defects of what the late Poet Laureate aptly described as “the lawless science of our law.”

II. The obscurities which beset the subject have been greatly aggravated by the very unpraiseworthy ingenuity which judges have commonly exerted to confine their discussions and their rulings within the narrowest possible boundaries. Even the House of Lords, which, as a general rule, is not lacking in a due appreciation of the obligations incumbent upon it as a court of last resort in a country where most of the codification of the law must for the present be carried on by the collation of earlier decisions, has in this instance chosen the worse part. In the recent case of *Mulholland v. Caledonia R. Co.* (a) it has had for the first time an opportunity of expressing its views as to the theory upon which the limits of liability for negligence should, as respects persons, be fixed; but it has failed entirely to rise to the occasion. When it is remembered how much trouble questions of the type

invitation, of course he must take reasonable care that these premises do not injure those who are coming there;” that “it is because he has the conduct and control of premises which may injure persons whom he knows are going to use them and who have a right to do so, that he is bound to take care to protect those persons who will thus be brought into connection with him,” and that a similar obligation and for a similar reason arises where the thing so controlled is a chattel. *Le Lievre v. Gould* (1893) 1 Q.B. 491. Compare *Heaven v. Pender* (1882) 9 Q.B.D. 302, per Cave, J.; *Smith v. Steele* (1875) 10 Q.B. 125, per Blackburn, J.; *Collis v. Selden* (1868) L.R. 3 C.P. 495, per Bovill, C. J.; *Scholes v. Brook* (1891) 63 L.T.N.S. 837, per Romer, J.

(b) “Where is the duty of care? I answer that duty exists in all men not to injure the property of others.” *Hayn v. Culliford* (1879) 4 C.P.D. 182, 185, per Bramwell, B.

(a) (1898) A.C. 216.

involved have given the courts since the ruling in *Langridge v. Levy* (b), the contracted scope of the arguments seems to amount to a sort of dereliction of duty.

Unsatisfactory as this case is, however, it marks the completion of an important stage in the development of this branch of law. As a deliberate judgment of the highest court of the Empire, it will not only operate as a final settlement of such questions as actually fall within its scope, but will have a considerable influence in determining the trend of judicial opinion with respect to points upon which it does not directly touch. The time seems not inopportune, therefore, for a survey of the whole subject which is dealt with in one of its phases by this decision. It will be convenient to assume, for the sake of simplicity, that we always have to do with persons whose exposure to the dangerous conditions which caused their injury occurred while they were in the exercise of some right which it is permissible, in the present connection, to describe as perfect. Such modifications as these principles may demand in any particular case, where the plaintiff's rights are of the inferior grade, denoted by the terms "mere licensee" and "volunteer," or "trespasser," can be readily supplied. It would be still more out of place in a general investigation, like the present, to take any account of the theory elaborated by Bowen, L.J., in *Thomas v. Quartermaine* (c), that the maxim, *Volenti non fit injuria*, operates by negating the existence of a duty in regard to the persons who bring themselves within its terms.

III. The only available starting-point for an investigation which the decisions suggest seems to be the principle that an action for injuries resulting from negligence in respect to a subject-matter which is covered by a contract cannot, as a general rule, be maintained by one who is a stranger to that contract. The discussion upon which we are entering may, therefore, be appropriately opened with the statement that this principle has been recognized

(b) 2 M. & W. (1837) 519.

(c) (1887) 18 Q.B.D. 625. The observations of Lord Esher in *Yarmouth v. France* (1887) 19 Q.B.D. 647 (pp. 652, 657) and of Lord Halsbury and Lord Herschell in *Smith v. Baker* (1891) A.C. 325 (pp. 336, 366) shew that this theory has by no means found such universal acceptance that it can be placed on the same footing as the doctrines respecting the position of one who is and of one who is not invited to enter on the premises or use a chattel.

in cases where the contract was one of sale (*a*), of bailment (*b*), for the manufacture of a specific article (*c*), for work and labor with reference to a chattel (*d*), for professional services (*e*), and for the transmission of telegrams (*f*).

IV. It can scarcely be doubted that this arbitrary doctrine is, to some extent at least, one of the inconvenient legacies bequeathed to modern English law by the old technicalities as to form of action. The standpoint of the judges by whose decisions it was established in its present form is indicated unmistakably by the remark of Lord Abinger in *Winterbottom v. Wright* (*a*), that the cases in which the law permits a contract to be turned into a tort,

(*a*) *Langridge v. Levy* (1837) 2 M. & W. 519, 4 M. & W. 337; *Winterbottom v. Wright* (1842) 10 M. & W. 109; *Longmold v. Halliday* (1851) 6 Exch. 761; *George v. Skivington* (1869) L.R. 5 Exch. 1, per Cleasby B. "The general principle," remarks a distinguished American judge, "applicable to this class of cases is that a vendor takes on himself no duty or obligation other than that which results from his contract. For a breach of this he is liable only to those with whom he contracted. All others are strangers. The law fastens on him no general or public duty arising out of his contract, for a breach of which he can be held liable to those not in privity with him:" *Davidson v. Nichols* (1866) 11 Allen 514, per Bigelow, C.J.

(*b*) *Caledonia R. Co. v. Mulholland* (1898) A.C. 216; *Heaven v. Pender* (1883) 11 Q.B.D. 503.

(*c*) *Francis v. Cockrell* (1870) L.R. 5 Q.B. 184, per Hannen, J., arguendo.

(*d*) *Collis v. Selden* (1868) L.R. 3 C.P. 495, where a declaration was held demurrable which alleged that the defendant negligently hung a chandelier in a public house, knowing that the plaintiff and others were likely to be therein and under the chandelier, and that the chandelier unless properly hung, was likely to fall upon and injure them, and that the plaintiff being lawfully in the public house, the chandelier fell upon and injured him. In *Elliott v. Hall* (1888) 15 Q.B.D. 315, Grove, J. (p. 321) said that he would have found some difficulty in arriving at the same conclusion as the court came to in this case, but his remark, as the context shews, had no reference to the general principle stated in the text, but merely to the strictness with which the pleadings were construed.

(*e*) *Robertson v. Fleming* (1861) 4 Macq. 167, the House of Lords explicitly rejected the doctrine that where A. employs B., a professional man, to do some act professionally, under which, when done, C. would derive a benefit, the negligence of B. in carrying out the instructions of his employer, by reason of which C. loses the contemplated benefit, will render him answerable to C. A recent decision on very similar lines is that a surveyor appointed by a landowner who has procured from another person a loan of money for a purchaser of the land who is under covenant to erect a building thereon, the understanding of the parties being that the money is to be advanced in instalments as the work progresses, owes no duty to the lender to use care in making out the certificates which were to shew that certain stages in the work had been reached, although the advances are made in reliance on the correctness of those certificates. *Le Lievre v. Gould* (1893) 1 Q.B. (C.A.) 493, overruling *Cann v. Wilson* (1888) 39 Ch.D. 39, a case of valuation of property with a view to raising money on it.

(*f*) *Dickson v. Renter's Tel. Co.* (1877) 2 C.P.D. 62, 3 C.P.D. 1; *Playford v. United Kingdom Tel. Co.* (1869) L.R. 4, Q.B. 706; *Feaver v. Montreal Tel. Co.* (1873) 23 Upper Can. C.P. 150. The American cases holding a telegraph company liable to a lessee are not based on any denial of the correctness of the general principle relied on in these cases, but merely override it for special reasons. See V. note (*e*), post.

(*a*) 10 M. & W. (1842) 109.

except those in which some public duty has been undertaken or public nuisance committed, are all cases in which an action might have been maintained on the contract. It was considered, therefore, that the combined effect of this principle and of the rule that no one but a party to a contract can sue on it, was that in no case whatsoever create any right of action arise in favour of a stranger to the contract as a result of the non-performance.

That there is an obvious *petitio principii* involved in the argument seems evident. It does not by any means follow that, because a party to a contract can recover in tort only when the rights acquired by his contract are sufficient to enable him to maintain an action, a person who had nothing to do with the contract, but who subsequently finds himself damaged by what the parties to it have done or left undone, should be told that he has no remedy at all. To declare such a person unable to sue on the contract itself is one thing (*b*). It is quite another thing to argue that the principle by which a party to the contract, whatever the form of his action, can recover only where he could have recovered in a suit directly upon the contract, involves the corollary that a stranger to the contract, being unable to sue upon it, is precluded from redress altogether. In the one case, as the parties have chosen to define their relations by an agreement between themselves as to the subject matter, it is reasonable enough to say that the agreement shall be the measure of their rights in regard to the same subject matter. But the reasoning which would make this principle controlling with respect to a stranger to the contract, a person who has not assented to it and has no means of securing its proper performance, seems to savour strongly of that scholasticism which has so often led the English Courts to emphasize the shadow

(*b*) It is an interesting example of the conservatism of English jurisprudence that, even after the supremacy of equity over law is supposed to have become an accomplished fact, the rule that a stranger to a contract cannot sue on it, even when it was made for its express benefit, should subsist side by side with the doctrine that such a contract will create a right of action in favour of the stranger to it when it amounts to a declaration of trust: *Re d'Angebau* (1880) 15 Ch.D. 57; *Re Flavell* (1883) 25 Ch. D. 93; *Gandy v. Gandy* (1885) 30 Ch. D. 57. The theory upon which, according to Crompton, J., in *Tweddle v. Atkinson* (1861) 1 B. & S. 393, the common law rule is based, viz.: that it would be a "monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued," would, if admitted as valid by equity courts, prove fatal to most declarations of trust. The obvious inference seems to be that, unless some reasonable way of differentiating declarations of trust in favour of a designated person from other contracts for the benefit of a third party, the equitable and common law rules cannot logically co-exist in the same system of jurisprudence.

and ignore the substance of a juridical situation. It has been attempted to justify the accepted rule on broader grounds, but these will be more conveniently treated in another place. (See XIII. post).

The hardship of the general rule is, in practice, a good deal mitigated by the various qualifications to which it is subject. These we shall now proceed to discuss.

V. The first two doctrines to be noticed are based on considerations which only affect a small proportion of the community.

(A). Any person who is injured by negligence in the performance of a public duty may recover damages from the person subject to that duty, although the contract which led to his being in the situation which exposed him to the risk of injury from such negligence may have been entered into by other parties.

The familiar principle that, "if a public officer abuses his office, either by an act of omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer" (*a*), would, as respects duties which are public in the sense that they are undertaken by State functionaries, plainly involve the consequences indicated by this proposition, if such duties could legitimately be referred to an antecedent contract. But as this element is wanting in such cases, the rule as to public duties concerns us in the present connection only in so far as it relates to duties which are deemed public, because they arise out of the pursuit of a few occupations, the essential characteristic of which is that they imply a standing offer to perform certain services for any member of the community who may demand them. All the reported decisions seem to have reference to common carriers, whose liability for injury to persons or property who have once been received on the transporting vehicle, is, as is well settled, independent of contract (*b*), but the rule would presumably be applied in an action brought against an innkeeper or a farrier (*c*). A notary-public, however, whose

(a) Best, C.J., in *Henly v. Mayor, etc.*, 5 Bing. 91 (p. 107). See also Lord Holt's remarks in *Lane v. Cotton*, 1 Ld. Raym. 646 (p. 654) as the right of action against sheriffs.

(b) *Winterbottom v. Wright* (1842) 10 M. & W. 109; *Longmeid v. Holliday* (1851) 6 Exch. 761; *Foulkes v. Metropolitan R. Co.* (1880) 5 C.P.D. 157; *Marshall v. York, etc. R. Co.* (1851) 11 C.B. 655; *Martin v. G.I.P.R. Co.* (1867) L.R. 3 Exch. 9; *Austin v. Great Western R. Co.* (1867) L.R. 2 Q.B. 442; *Dalyell v. Tyrer* (1858) El. Bl. & El. 899.

(c) See the opinion of Lord Holt in *Lane v. Cotton*, ubi supra.

functions would seem naturally to place them in a similar category, is held not to be liable to a person whom his negligence may collaterally injure (*d*). Whether any other occupations are public within the meaning of the rule is doubtful, as the books suggest no diagnostic mark by which they can be identified (*e*).

It would seem that this doctrine as to public duties, though depending historically upon considerations of social expediency, might also be referred to the principle of an invitation implied from the nature of the occupations of which such duties are an incident (*f*). But any speculations in this direction would be purely theoretical.

(B). Apothecaries or surgeons are liable for the unskillful treatment of their patients, although they were employed by other parties (*g*).

The conceptions which underlie this rule would seem to be analogous in some respects to those which are apparent in (A), but the foundation actually assigned for it by the courts, is that, under any other doctrine, the defendant would virtually evade all liability, since, in the nature of the case, only the patient could prove actual damage—at all events where no loss of services is involved. This reason is interesting, as it dimly suggests the existence of a great principle, which, if admitted as a determinative factor in this class of cases, would plainly aid us greatly in putting the limits of responsibility upon a more rational basis. If such inconsistencies were not so common in English law, one might well feel some surprise that a doctor should be held responsible in this ground to a person not privy to the contract of employment, while, in other cases of professional services rendered under precisely similar conditions, the immunity of the defendant being equally inevitable unless the stranger to the contract for whose benefit it was made is permitted to sue, this consideration is not only not allowed the

(*d*) *Simpson v. Thomson*, 3 App. Cas. 279 (p. 289).

(*e*) One of the grounds assigned in the United States for holding telegraph companies (see IV. ante), is that by the statutes which authorize them to do business they are required to send messages for anyone who may apply and without any undue preference, are therefore virtually public agents or servants in the same sense as carriers. *Ellis v. American Tel. Co.*, 95 Mass. 231. Another view is that they are actually common carriers: *Shearm & Redf. on Negl.* (5th ed.) secs. 534, 535.

(*f*) See such cases as *Marshall v. York, &c., Ry. Co.*, *Austin v. Great Western R. Co.*, and *Dalyell v. Tyrer*, cited in note (*b*), supra.

(*g*) *Pippin v. Shephard* (1822), 11 Price 400; *Gladwell v. Steggall* (1839) 8 Scott 60; 5 N.C. 733.

same weight, but, so far as the present writer is aware, has not even been discussed (*h*).

VI. The next two propositions exhibit the effect of doctrines which operate by carrying us altogether outside the characteristic principles of the law of negligence.

(C). The operation of the general rule that a person who creates a public nuisance is liable to anyone who, being in the exercise of his lawful rights, sustains special damage therefrom, is not restricted by the fact that the nuisance resulted from the negligent performance of a contract with a third person (*a*).

This rule amounts simply to a statement that, if the actual consequences of a person's negligence is the creation of a nuisance, his liability is measured by the standards appropriate to that offence, and is therefore really determined without any regard to the question whether he was or was not negligent. The lower offence, being, as it were, merged in the higher, it becomes quite immaterial whether the plaintiff was a stranger to the contract in the performance of which the nuisance was created. The circumstance that the material substances which constituted the injurious agency had passed out of the control of the negligent person at the time they inflicted the injury in suit also ceases to be defence under such circumstances, as is shown by the cases where a landlord is held liable for a nuisance which existed on the leased premises when they were demised (*b*).

The essential result of the rule, therefore, is that a negligent act which produces precisely the same physical conditions may render a person liable to a much wider range of persons in one case than in another, merely because the locality in which those conditions happen to be produced renders them a public nuisance,—a predicament which obviously cannot be justified on logical grounds.

(D). If A, in carrying a contract with B, is not merely negligent, but is also guilty of a fraudulent misrepresentation in respect to the subject-matter, a stranger to the contract, C, who is injured by his reliance upon

(*h*) See V. ante.

(*a*) *Longmeid v. Holliday* (1851) 6 Exch. 761, where Parke B. instanced the case where a defective bridge is erected by a contractor on a public highway. To the same effect see *Collis v. Selden* (1868) L.R. 3 C.P. 495; *Winterbottom v. Wright* (1842) 10 M. & W. 109.

(*b*) *Rosewell v. Prior*, case 6, 2 Salk. 460, approved in *Cheetham v. Hampson*, 4 T.R. 318, per Buller, J., p. 320; *Rich v. Basterfield*, 4 C.B. 783, 16 L.J.C.P. 273; *Gandy v. Jubber*, 5 B. & S. 78, 9 B. & S. 15.

that misrepresentation may recover damages from A, provided he falls within the category of those persons who are permitted to claim an indemnity for fraud from one with whom they have not directly dealt (c).

The application of the above doctrine to cases of this type seems to have been originally due to the desire of the judges who decided *Langridge v. Levy* to turn the flank of a troublesome problem. But before long its influence was manifested in a more positive form. In two cases (d) where no such evasion of the fundamental issue was possible, these judges committed themselves without reservation to the theory that, where the nature of the facts is such as to exclude the conceptions of a nuisance and of an inherently dangerous thing, fraud is not merely a possible ground, but the only ground upon which a stranger to a contract of sale could recover damages for injuries traceable to its non-performance. Whether there can be a recovery under this doctrine is obviously a mere question of fact,—was the defendant guilty of a fraudulent representation, and was the plaintiff one of those persons who have a right to be indemnified for injuries caused by reliance on that representation? Here again, as in (C.) ante, the doctrine operates so as to make the defendant's negligence, though in a different

(c) *Langridge v. Levy* (1837) 2 M. & W. 519; 4 M. & W. (Exch. Ch.) 337. The rationale of this case is clearly shewn by the following passage of the opinion of Baron Parke: "As there is fraud, and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the person injured." In a later case the principle of the decision was said to be, "that the father having bought the gun for the very purpose of being used by the plaintiff, the defendant made representations by which he was induced to use it." Alderson, B. in *Winterbottom v. Wright* (1842) 10 M. & W. 109 (p. 115). Compare the remarks of Parke, B. in *Longmeid v. Holliday* (1851) 6 Exch. 761; and of Page-Wood, V.C. in *Barry v. Croskey* (1861) 1 John. & H. 1. It was also expressly stated in *Blake-more v. Bristol, &c. R. Co.* (1858) 8 El. & Bl. 1035 that wilful deceit was the ground of the decision (p. 1050).

(d) *Winterbottom v. Wright* (1842) 10 M. & W. 109; *Longmeid v. Holliday* (1851) 6 Exch. 761. The opinion of Cave, J. in *Heaven v. Pender* (1883) 9 Q.B.D. 302, shews that he regarded the law as being settled in this sense, and although the actual judgment of the Queen's Bench Division was reversed by the Court of Appeal (11 Q.B.D. 503), the reversal had no reference to this theory. The comment of Brett, M.R. on *Langridge v. Levy*, supra, that, "taking the case to be decided on the ground of a fraudulent misrepresentation made hypothetically to the son, and acted upon by him, such a decision upon such a ground in no way negatives the proposition that the action might have been supported on the ground of negligence without fraud," (*Heaven v. Pender*, L.R. 11 Q.B.D. 503, 512) seems to be shaped by a wish to minimize the effect of the case as one adverse to his own theory, to be noticed hereafter. (XII.) The later decisions by the same Court, as just cited, leave no doubt as to the intention of the judges to negative the plaintiff's right to recover, if his action had sounded in negligence alone. In *Collis v. Selden* (1868) L.R. 3 C.P. 495 (see III. ante), all the judges conceded that the plaintiff might have recovered, if he had established fraud.

way, an immaterial factor, except in those cases where it is of that reckless and wilful character which is assimilated to fraud for reasons fully explained in *Le Lievre v. Gould* (e) and other cases. What persons are entitled to recover damages for fraud is a question which falls outside the scope of the present article (f).

VII. The next doctrine to be noticed is one which is referable to the conception that specially stringent obligations are incurred by those who undertake to deal with material substances of certain classes.

(E). A person who uses or leaves about in such a way as to cause danger an instrument which is dangerous in itself is liable independently of contract, to anyone who is injured thereby.

This proposition closely follows the words of Romer J. in *Scholes v. Brook* (a), expressly approved by Lord Justice Bowen in *Le Lievre v. Gould* (b). The doctrine which it embodies is apparently traceable to *Dixon v. Bell* (c), 198, where the injury was caused by the carelessness of the defendant's messenger in handling a loaded gun. Yet it seems very dubious whether the court which decided that case intended to do more than apply the principle that consummate care is obligatory in dealing with specially dangerous articles. The gist of the ruling is merely that the jury was justified in finding that the defendant did not take the precautions which a prudent man would have taken in a case where a young and thoughtless girl was sent to fetch a gun known to be loaded, the view of Lord Ellenborough being that the message to the person in charge of the weapon should at least have instructed him to draw the charge instead of the priming merely. The defendant being delinquent in this respect, the case becomes simply one of an agent's negligent execution of negligent instructions, the result of which would of course be to fasten a joint and several liability both upon the principal and upon the agent. In view of the subsequent development of the law on this subject, however, the correct construction of this

(e) (1893) 1 Q.B. 493.

(f) It may, however, be noted that in *Barry v. Croskey* (1861) 1 John & H. 1 Vice-Chancellor Page-Wood considered that the plaintiff in *Langridge v. Levy*, *supra* could not have recovered, if he had been a stranger who had found the gun lying about in some public place, and relying on the name which he saw imprinted on it, had fired it off.

(a) 61 L.T.N.S. (1891) 837.

(b) (1893) 1 Q.B. 493.

(c) 5 M. & S. (1816) 198.

case has become immaterial. It is now well settled that the range of responsibility, in respect to persons, is wider where the injurious agency is a thing "dangerous in itself" or "imminently dangerous" than where it does not come under that category. For aught that appears the duty to deal with such things carefully seems like the duty to avoid creating a nuisance, to be owed to all the world. The existence of a duty, of this extent is not, at all events, negatived by any of the considerations which have been deemed fatal to the plaintiff's right of action in cases where the injurious agency was not of this character (*d*).

VIII. The most serious practical difficulty involved in the application of this doctrine is that no really adequate scientific test has ever been, or perhaps can be suggested, by which it can be determined whether an injurious agency does or does not belong to the category of things dangerous in themselves. As a sober matter of fact, considered without reference to the subtleties of legal construction, it is impossible to deny that, under certain circumstances, things which are normally quite safe to persons who handle or come into proximity to them, change their character so completely as to be fraught with fully as much peril to such persons as the loaded gun in *Dixon v. Bell*, supra, supposing, that is to say, that the dangerous conditions are, as in that case, not apparent. Shall we say, then, that as has been declared by the New York Court of Appeals, that the distinguishing characteristic of things which are imminently dangerous in themselves, is that "serious injury" to any persons using them is a natural and probable consequence of such use? (*a*) The acceptance of this test would necessitate the adoption of the theory of that court in the case cited, that a defective scaffold is a thing essentially dangerous, and the same reasoning would be equally applicable to many other industrial agencies and articles of commerce. Even in New York, however, the courts have shrunk from the conclusion to which their own logic points (*b*), and such a theory enunciated would, of course,

(*d*) See *Longmeid v. Holliday* (1851) 5 Exch. 761, per Parke, B.; *Collis v. Selden* (1868) L.R. 3 C.P. 495, per Willes, J.; *Heaven v. Pender* (1883) 11 Q.B.D. 503, per Cotton, L.J.; *Caledonia R. Co. v. Mulholland* (1898) A.C. 216, per Lord Shand. See, however, the remarks of Baron Parke in *Langridge v. Levy* (1837) 2 M. & W. 519, referred to in X, post.

(*a*) *Devlin v. Smith* (1882) 89 N.Y. 470.

(*b*) *Losee v. Clute* (1873) 51 N.Y. 494 (steam boiler not a dangerous instrument; *Loop v. Litchfield* (1870) 42 N.Y. 351 (same decision as to fly-wheel which burst); *Burke v. De Castro* (1877) 11 Hun. 354 (same decision as to defective hoisting

be quite irreconcilable with the series of English cases which begins with *Langridge v. Levy* (c). So far as the actual decisions go, it would seem that the rule as to things dangerous is in England restricted to explosives (d), though it is not improbable that, if the question were actually presented, the judges might follow the American decisions which extend it to poisonous drugs (e).

In its present shape, therefore, this rule seems to be of a very slender juridical value, its operation being confined to a small class of articles, the boundaries of which it is difficult, if not impossible, to establish on any logical grounds. The law of the subject, however, might be placed upon a more rational foundation if cases of this type were referred, as they might well be, to the principles upon which a duty is in some cases predicated to impart information as to the dangerous qualities of substances which a person allows to pass out of his immediate control. [See (H.) post. and the cases cited in note (g), below]. On the one hand, it would be difficult to suggest any sound reason why the things which are regarded as "dangerous in themselves," should not, for the purposes of legal liability, be held to be removed from that category by proof that the person injured by them was aware of their true character. At

rope). It should be noted however, that all these rulings preceded that in *Devlin v. Smith*, *supra.*, and that the last one has been formally overruled in *Davies v. Pelham* (1892) 65 Hun. 573, *aff'd* (without opinion) in 146 N. Y. 363 (derrick for hoisting heavy stones). Other American courts seem to have uniformly refused to extend the liability of manufacturers and vendors on this ground beyond their immediate transferee. See *Ziemann v. Kieckhofer* (1895) 90 Wisconsin Rep. 497 (goods elevator); *Heiser v. Kingland, & Co.* (1892) 110 Missouri Rep. 105 (threshing machine); *Roddy v. Missouri Pac. R. Co.* (1891) 104 Missouri Rep. 234; 12 Lawy. Rep. Ann. 746 (defective brakes—compare Lord Shand's opinion in the *Mulholland Case* [1898] A.C. 216); *Goodlander Mill Co. v. Standard Oil Co.* (Circ. Ct. of App. 1894) 63 Fed. Rep. 400 (crude petroleum); *Bright v. Barnett* (1894) 88 Wis. 299, 26 Lawy. Rep. Ann. 524 (defective scaffold). *S.P. Smith v. Onderdonk* (1898) 25 Ont. App. 171 (defective locomotive).

(c) See especially the remarks of the judges in the cases cited in the notes (to VII) *supra.*, and compare the remark of Lord Justice Bowen that the law of England "does not consider that what a man writes on paper is like a gun or other dangerous instrument, and, unless he intended to deceive, the law does not, in the absence of contract, hold him responsible for drawing his certificate carelessly." *Le Lievre v. Gould* (1893) 1 Q.B. 493 (p. 502), approving a dictum of Romer, J., in *Scholes v. Brook* (1891) 63 L.T.N.S. 837.

(d) See the cases cited in VII. *supra.* Compare *Parry v. Smith* (1879), 4 C.P.D. 325, (gas-fitter held liable, as for "a misfeasance independent of contract," to a servant of the proprietor of the building for an explosion of gas resulting from his carelessness in leaving an imperfectly connected tube); *Wellington v. Downer, & Co.* (1870), 104 Mass. 64 (manufacturer of inflammable oil, selling it without giving notice of its dangerous properties, liable to any person who may subsequently purchase it of a retail dealer).

(e) *Thomas v. Winchester* (1852) 6 N.Y. 397; *Norton v. Sewall* (1870) 106 Mass. 143.

all events, it is clear that, under such circumstances, the maxim, *Volenti non fit injuria*, would in most instances furnish a perfect protection to a defendant. On the other hand, it seems undeniable that the courts, in establishing the doctrine imposing a more than usually stringent rule of responsibility upon those who deal with things of this kind, have been much influenced by the fact that the persons who will handle or come into proximity to them, after they have left the possession of the original transferor, are commonly, in the very nature of the case, ignorant of the dangers to which contact or proximity will expose them (*f*).

In some cases the special duty alleged to have been violated in regard to articles exceptionally dangerous was that of notifying the transferee of their properties (*g*), and although the language used by the judges seems to shew that they viewed the injurious agency merely as things which required more care and caution than ordinary merchandise (*h*), rather than as things inherently dangerous in the sense with which we are now concerned, the analogy is sufficiently close to justify vouching these decisions in aid of our position that a rule, essentially identical in its practical results with that formulated in (E) above, and far more precise and rational, would be secured if the courts were simply to lay it down that one who transfers an exceptionally dangerous thing does not exercise the measure of care which the circumstances demand, unless, at the time of the transfer, he sees that the transferee is not under any misapprehension as to its properties, and that for an omission to discharge this duty he must respond in damages to anyone, whether a remote transferee or not, whom the article injures while its properties remain undisclosed and undiscovered by the persons through whose hands it passes. (See also XI., post.).

IX. A rule expressed in this form would place the liability for injuries caused by articles of this class on the same basis as that to which a person who has created a trap is subject. In fact it

(*f*) In the American cases as to the sale of poisonous drugs see the last note. Much emphasis was laid on the fact that the plaintiff did not know and had no reasonable means of knowing that the drug was dangerous.

(*g*) *Brass v. Mailland*, 6 El. & Bl. 470; *Farrant v. Barnes* (1862), 11 C.B. N.S. 553; *Lyell v. Ganga Dai* (1875), Indian L. Rep. 1 All. 60, where the persons injured were the servants of a carrier to whom the dangerous article had been delivered for transportation. *S. P. Standard Oil Co. v. Tierney* (1891) 92 Kentucky Rep. 367; 14 Lawy. Rep. Ann. 677.

(*h*) See especially the opinion of Willes, J. in *Farrant v. Barnes*, *supra*.

would seem that the only essential difference between a trap and a thing dangerous in itself is that the former expression refers to the condition of real property or of chattels affixed more or less permanently to real property while the latter suggests a chattel of an essentially movable character considered without any relation to locality (*a*)

That there is, apart from contractual relations, a duty incumbent on the owner of premises to inform persons who rightfully enter thereon of anything in the nature of a trap, is well settled (*b*), the theory being, as the word itself shows that they may, in the absence of notification, be led by a feeling of false security to do something which, if they had understood the conditions, they would have left undone. As the situation thus predicated is obviously the same in all essential respects as that which arises when a person "uses or leaves about" one of those things which are dangerous in themselves it would seem that the liability in both instances might not unjustifiably be referred to the same considerations. The recognition of this analogy between traps and things dangerous in themselves would logically involve the result that the extent of responsibility, as respects persons, would be identical in each case, but whether this is the effect of the actual decisions is a matter of doubt. The language of Mr. Justice Willes in note (*a*) indicates that the liability for a trap is at all events wide enough

(*a*) The following remarks of Willes, J., in *Collis v. Selden* (1868) 3 C.P. 495, show the close affinity between the two classes of cases: "The chandelier is to be regarded as movable property, and the declaration should have shown either that it was a thing dangerous in itself, and likely to do damage, or that it was so hung as to be dangerous to persons frequenting the house. If that averment had been made and proved, the case might fall within the class to which *Sullivan v. Waters*, 14 Jr. C.L.R. 460, belongs,—as a trap to persons using or likely to use the way whether public or not." So in a case in the Court of Appeal, we find it declared in one passage that the danger arising from want of a cover for the hatchway of a lighter being perfectly obvious to everyone, the servant of a stevedore who falls through the hatchway, while working for a sub-contractor who has been placed in possession of it, cannot hold the owner of the lighter liable for the injuries so received on the theory that it was delivered to the sub-contractor in an "inherently dangerous condition," and that the danger was concealed from those who might be rightfully on board, while elsewhere the language used is to the effect that the plaintiff could not recover on the theory that the hatchway was a trap. *O'Neil v. Everest* (1891), 61 L.J.Q.B. 451. The same blending of the two conceptions is traceable in *Coughtry v. Woollen Co.*, 56 N.Y. 124 and *Devlin v. Smith* (1882) 89 N.Y. 470.

(*b*) *Membersy v. Great Western R. Co.* (1889) 14 App. Cas. 179 per Lord Halsbury (p. 184). See also *Indermaur v. Dames* (1866) L.R. 1 C.P. 274 (p. 289); *Smith v. London etc. Docks Co.* (1868) L.R. 3 C.P. 326. This duty is owed even to mere licensees. *Gautret v. Egerton* (1867) L.R. 2 C.P. 375; *Bolch v. Smith* (1862) 7 H. & N. 736.

to include all those who may reasonably be expected to come within the sphere of danger created by it, and, in spite of the very general expressions used in speaking of things dangerous in themselves, it is not certain that the range of liability in this instance is more extensive (c). In both classes of cases, it will be remarked, there are intimations more or less distinct of a comprehensive principle towards which the law may possibly be advancing, and which would create a right of action in favour of any member of the community who might be injured by handling or coming into proximity to property in which there is a latent danger, which the defendant, although he had become aware of its existence before the property had passed out of his custody, had failed to disclose to his immediate transferee. The obvious exception to which this principle must always be subject where the plaintiff was injured after the property had passed through several hands and one of the holders had, after discovering the same dangerous conditions, neglected to communicate his knowledge to his next succeeding transferee, depends upon considerations which carry us into another section of the principles defining the limits of legal causation and demands a merely passing notice (d).

X. In the next proposition the principle of an invitation emerges once more into prominence.

(F). If it is agreed, as an incident to a contract between A. and B., for the performance of work on A.'s premises, that A. shall furnish certain appliances to facilitate the work, and it is contemplated that Z. and the other persons employed by B. to do the work will put these appliances to immediate use, A. remains responsible, during a reasonable period after the appliances are placed at the disposal of Z.'s master, for injuries caused by defects in the appliances which might have been discovered by a proper inspection.

This seems to be the actual effect of the much discussed case of *Heaven v. Pender* (a), though it is sometimes cited as an authority

(c) See VII., note (d) ante.

(d) Attention may be drawn, however, to the remarks of Brett, M. R., in *Cunnington v. Great Northern R. Co.* (1883) 49 L. T. N. S. 392 as to the difference between the position of transferors who are and who are not entitled to assume that the object transferred will be examined before being used. See also the comments on *Heaven v. Pender* in *Hopkins v. Great Eastern R. Co.* (C. A. 1896) 60 J.P. 86.

(a) 11 Q.B.D. (C.A. 1883) 503, reversing the decision of the Queen's Bench Division (9 Q.B.D. 302) which turned upon the theory that the fact of the scaffold's having passed out of the defendants' control at the time of the accident was a conclusive bar to the action. Some years previously the same conclusion as to similar facts had been arrived at in Massachusetts. *Mulchey v. Methodist, etc. Soc.* (1878) 125 Mass. 487.

for much wider propositions. Construed in this manner it simply means that the doctrine of *Indermaur v. Dames*, (*b*) which obliges the owner of premises to use care to keep them in safe condition for the use of workmen who enter therein to do something in which he is interested, even though they are not directly employed by him, is also the measure of his duty with regard to any chattels which he may furnish them to facilitate their work (*c*).

The decision shews that it is less easy to divest oneself of responsibility for the condition of a chattel where it is transferred by way of bailment than where it is transferred by sale (*d*). How long that responsibility remains with a bailor under the circumstances shown is a point left in uncertainty by the opinion of Cotton, L.J., but from the stress which he lays on the fact that the appliance was furnished for "immediate use," as well as from the language used by the Lords Justices in *Hopkins v. Great Eastern R. Co.*, (*e*) it seems a legitimate inference, that the bailor would be held answerable until the bailee discovered that the appliance was defective or, failing such discovery, until such time as duty arose on his part, to subject it to a reasonably careful examination.

The essential grounds of distinction between *Heaven v. Pender* and the recent ruling in *Caledonia R. Co. v. Mulholland* (*f*) are not easy to define. It was held in the latter case that an arrangement by which one carrier, A., after transporting goods to the point specified in his agreement with the shipper, allows a connecting carrier, B., for his own convenience, to draw the vehicles with their loads to a place designated by the party to

(*b*) L.R. 1 C.P. 274.

(*c*) In a recent case Lord Herschell made the following remarks with regard to this decision: "The plaintiff was there upon the invitation of the dock company; and, although it is true that this staging was used for painting a ship, it was part of the appliances supplied by the dock company for purposes connected with the carrying on of their business. It was one of their facilities given by which they induced vessels to use their docks that they did supply these appliances." *Caledonia R. Co. v. Mulholland* (1898) A.C. 216 (p. 227). See also *Membery v. Great Western R. Co.* (1889) 14 App. Cas. 179, where, however, the decision went off on other points. In a passage of his opinion in *Scholes v. Brook* (1891) 63 L.T.N.S. 837, Romer, J. took occasion to remark that an invitation to advance money to take shares on a valuation does not fall under the same principle as an invitation to enter premises.

(*d*) See the cases cited in the notes to III. which all assume that, as regards strangers, the vendor's liability ceases, when the transfer of the chattel is complete, unless he can be held for one of the special reasons afterwards commented on in sections IV., et seq.

(*e*) 60 J.P. (1896) 86.

(*f*) (1898) A.C. 216.

whom B. has contracted to deliver the goods does not create in favour of the servants of B. who are to handle the vehicles an obligation on A.'s part to examine the vehicles in order to ascertain whether they are in a safe condition for the additional journey. If we could suppose that the controlling factor was that there was a gratuitous loan of the vehicles, we should at once have an intelligible basis of differentiation, for, upon the principle to be noticed below (IX.), the first carrier could not be held liable to the servants of the second except for such injuries as resulted from defects in the wagons which were actually known at the time of the transfer and not disclosed to the transferee. This view of the situation is not distinctly negatived by anything said on the opinions (*g*), nor are the prior decisions establishing the principle in question even referred to; but it seems to supply the simplest solution of the issues raised by the evidence. Another possible standpoint would be to regard the two cases as illustrating the antithesis between the positions of one who is invited and of one who is not invited to use a chattel (*h*). The rule which this construction would suggest is that the bailor of chattels is liable, independently of contract for injuries caused by discoverable defects in such chattels, where the injured person is one who used them on the bailor's premises to execute work in which he had an interest, but not where such person was using them merely by the bailor's permission for the accomplishment of some object in which he had no interest—especially where the loan involves the removal of the chattels from the bailor's premises. But as their Lordships have not thought fit to explain what they consider to be the true relation of this most unsatisfactory decision to those with which it comes in contact, both these theories as to its meaning must remain mere matters of surmise.

XI. In the doctrines so far noticed the consideration which, as was pointed out at the beginning of the article, furnishes the only

(*g*) Lord Shand considered that it was immaterial whether the vehicles were lent gratuitously or for a valuable consideration, as in either case the contract would be *res inter alios acta*, and could not be taken advantage of by strangers, such as the servants of the second carrier. But this remark seems to be merely a reaffirmation of the well established doctrine that the servants of the second carrier could not sue on the contract of their master with the defendant. See IV. ante.

(*h*) That a person who merely gives a contractor permission to use certain machinery, does not, by reason of such permission, incur any obligation to see that it may be safely used by the contractor's servants, has been expressly held in Massachusetts. *Pingree v. Leyland* (1883) 135 Mass. 398.

test by which it can be determined on logical grounds whether the plaintiff was a person to whom the defendant owed a duty to use care, is only inferentially involved. It is evident, however, that the general rule itself which we have been discussing and the rationale of some of the exceptions to it require us to assume the existence of a principle which may be formulated thus :—The mere fact that the defendant, if he had thought at all about the possible consequences of his negligence, must have seen that the dangerous conditions created by such negligence were likely to produce injury to persons coming within categories susceptible of ready ascertainment, will not render him liable for injuries which one of those persons may suffer by reason of the existence of those dangerous conditions (a). Some individual judges have undertaken to construct a theory of liability upon lines which would make this likelihood of injury to a particular person the controlling factor in every case (b). But the actual decisions cut down the above principle no further than appears in the two next propositions.

(G). Where a chattel is supplied for a specific purpose, whether by a bailment for a valuable consideration or by a sale, a person who is injured by reason of its being unfit for that purpose may, although not privity to the transaction, recover damages from the transferor, if he was informed that

(a) See *Winterbottom v. Wright* (1842) 10 M. & W. 109, where the likelihood of injury to any person driving the defective vehicle was manifest; *Langridge v. Levy* (1837) 2 M. & W. 519, where the risk of injury to the purchaser's son for whom the gun was bought was obvious to the seller; *Collis v. Selden* (1868) L.R. 3 C.P. 495, where the defendant must have seen that any customer of the public house would be endangered by the fall of the chandelier; *Longmeid v. Holliday* (1851) 174 6 Exch. 761, where it was clear that, if the lamp exploded it would probably injure some member of the purchaser's household; *Caledonia R. Co. v. Mulholland* (1898) A.C. 216, where the servants of the second railway company who would handle the cars were evidently the persons most likely to suffer if the cars were defective.

(b) See the formulæ suggested in XII., post. In *Cunnington v. Great Northern R. Co.* (1883) 49 L.T.N.S. 392, Brett M.R. defended the decision in *Dickson v. Renter's Tel. Co.*, L.R. 2, C.P.D. 62, 3. C.P.D. 1 on the ground that it would be idle to argue that a telegraph company were bound to come to the conclusion that, whatever telegram they misreported, there must be an injury to the person to whom it was misreported. This comment is not very easy to reconcile with the learned judge's general statement of principles in *Heaven v. Pender*, 11 Q.B.D. 503 (see XII., post), which he reiterated in *Cunnington's* case. That some damage should result is surely a natural consequence of an error in a message. In *Cann v. Wilson* (1888) 39 Ch. D. 39, Chitty, J. said that the rationale of *Heaven v. Pender* supra, was that the dock-owner had undertaken an obligation towards the plaintiff as being "one of the persons likely to come and do the work." But this is certainly not the theory relied on by the majority of the court. (See F. ante). The remark is therefore merely the expression of an individual opinion, which is still further discredited that the decision in which it was given has been overruled by *Le Lievre v. Gould* (1893) Q.B. 493.

such person was to use the chattel (c), or it was apparent that, in the nature of the case, he would use it (d).

(H). It seems that one who lends gratuitously a chattel to be used for a specific purpose is liable for injuries received by the bailee's servants, where it is in an unfit condition for use owing to defects which the lender was aware of and failed to disclose to the bailee (e). But in any event the lender does not owe such servants the duty of examining the chattel in order to ascertain whether it is defective (f).

The second of these propositions is not stated in positive terms, for the reason that the plaintiff in the three cases cited was, as a matter of fact, denied recovery on the ground that the defendant

(c) *George v. Skivington* (1869) L.R. 5 Exch. 1, where a hairwash which proved deleterious was bought for the plaintiff by her husband. In the case next cited Lord Esher stated the effect of the case as follows: If a tradesman supplies an article under such circumstances that he must or ought to have known, if he had thought about it, that the article would be used by other persons besides the purchaser, he owes a duty to those other persons, by reason of his knowledge that they will probably use it.

(d) *Hopkins v. Great Eastern R. Co.* (C.A. 1896) 60 J.P. 86, where the servant of one who had hired a coal-shoot was injured by using it. All the judges argued upon the assumption that it was their duty to use care in seeing that the shoot was in good condition at the time it was transferred to the hirer, inasmuch as its use by the workmen must have been contemplated. Lord Esher expressly assimilates the situation to that presented in *George v. Skivington* supra. Kay, L.J., thought the case came under the principle of *Heaven v. Pender*, (see X, ante), the effect of which he conceived to be "that, where a dock-owner supplies a ship-owner with staging which, in the nature of things, will be used by third persons, there is a duty on the part of the person who supplies the staging towards such persons to see that the staging is, at the time it was supplied, fit for the purpose for which it was intended, but not that it shall remain in that condition." This comment indicates clearly enough the standpoint of the court, though it seems to ascribe a much greater importance to the defendant's contemplation of the plaintiff's use of the scaffold, as a probable event, than the opinion of Cotton, L.J. warrants. It is, however, interesting to note, in view of the direction which this judge's reasoning took in his opinion, that according to the report of the case in 52 L.J. Q.B. p. 704, he put this question during the argument of counsel: "Does not the principle by which a man is liable to a person who is injured by a public nuisance apply to cases in which an improperly constructed article causes damage to a limited class of persons to whom it is supplied?" Compare also *Elliott v. Hall*, 15 Q.B.D. 315. The statement recently made by a member of the Ontario Court of Appeal in *Smith v. Onderdonk* (1893) 25 Ont. App. 171, that the only grounds on which the bailor could be made liable in a case of this type were misrepresentation or fraudulent suppression is clearly quite inconsistent not only with the *Hopkins Case* which they did not cite, but with *Heaven v. Pender* which was discussed. The decision itself, refusing to allow the servant of a sub-contractor to recover damages from the principal contractor for an injury caused by a defective locomotive supplied to the plaintiff's master for construction work, can scarcely be justified, in view of the fact that the accident happened on the same day as the locomotive was transferred to the bailee. It is somewhat unfortunate that the *Hopkins Case* was not called to the attention of the court.

(e) *Blakemore v. Bristol &c. R. Co.* (1858) 8 El. & Bl. 1035 J., followed in *MacCarthy v. Young* (1861) 6 H. & N. 329, and in *Coughlin v. Gillison* (1899) 1 Q.B. (C.A.) 145.

(f) *Coughlin v. Gillison*, ubi cit. *Caledonian R. Co. v. Mulholland* (1898) A.C. 216, referred to in X, ante, seems to be another case in which this principle, though not relied upon, is necessarily implied.

had no knowledge of the defects in the chattels lent. But the reasoning in *Blakemore's Case* seems to imply that the plaintiff would have been allowed to maintain the action, if he had been, instead of a mere volunteer, a servant regularly employed by the bailee. Supposing this to be a justifiable inference, the principle, underlying this ruling and those in which it has been followed would be that the duty to warn the bailee as to defects in the chattels lent enures to the benefit of any person besides the bailee, who is morally certain to use them. A servant of the bailee would obviously belong to this category, where the chattel lent was an industrial appliance which is either customarily operated by servants, or which must be so operated, for the reason that the bailee cannot manage it without assistance.

It would seem from the cases cited under (G) and (H) that the courts, although they have not formulated such a principle in express terms, have proceeded on the theory that as regards persons whom the transferor of a chattel is bound to take into his calculations as being likely to use it, the essential difference between the obligations resulting from a gratuitous transfer and from a transfer upon valuable consideration, is that in the former case his duty is limited to informing the transferee as to defects of which he has actual knowledge, while in the latter case his duty extends to examining the chattel with reasonable care before it leaves his possession.

It will be observed that the facts presented the cases under this head, which involve a bailment, are closely analogous to those in which an implied invitation is treated as the controlling factor. But the principle upon which they are based is of wider scope than that of an invitation, which, as the authorities now stand, can scarcely be considered to cover more than the predicaments which imply either actual control or, as in *Heaven v. Pender*, supra, what may be termed the constructive control which is supposed to have continued for a period, varying in length according to circumstances, after the injurious agency has left the possession of the party charged with culpability.

XII. The attempts which have been made to introduce some order into the chaos which, as the foregoing digest of the decisions only too clearly shews, has resulted from undertaking to solve, by means of a number of isolated doctrines between which there is little or no correlation, a class of problems which are identical as respects one essential element will next claim our consideration.

In one of the earliest of the cases upon which we have commented above, plaintiff's counsel endeavoured to procure the acceptance of the doctrine that, wherever a duty is imposed by contract or otherwise, and that duty is violated, anyone who is injured by such violation may recover damages from the wrong-doer (*a*). Parke, B., declined to discuss this argument, preferring to rest his decision on the grounds already mentioned (VI. ante), but said that he would hesitate to concede the correctness of the proposed doctrine even in the case of things dangerous in themselves. The same argument was again rejected in *Winterbottom v. Wright*, (*b*) and is impliedly negatived in all the later decisions cited above (*c*). For practical lawyers, therefore, the suggested theory possesses a mere historical interest, representing one of the abortive endeavours which have at various times been made to broaden and rationalize the foundations of our law. If the right of contracting is a form of property, which will scarcely be denied, the rejected doctrine is clearly nothing more than an application in a liberal sense, of the maxim *Sic utere tuo, ut alienum non laedas*, and upon this basis it would find a place in any scientific system of jurisprudence (*d*).

A theory of responsibility which has a much better chance of ultimately obtaining a foothold in our law is that formulated in the following well known passage of Lord Esher's opinion in *Heaven v. Pender* (*e*):

"Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

In another case decided a few months later we find the learned judge reiterating the same theory in somewhat different terms:

(*a*) *Langridge v. Levy* (1837) 2 M. & W. 519.

(*b*) 10 M. & W. (1842) 109.

(*c*) See also *Alton v. Midland R. Co.* (1865) 19 C.B.N.S. 213. In the unqualified form in which it was couched it obviously could not prevail even as to statutory duties since the decision in *Atkinson v. Newcastle, &c., Works*, 2 Exch. D. 44.

(*d*) It is by reasoning on the lines here suggested that an American writer of repute has undertaken to justify the decisions by the courts of the United States to the effect that a telegraph company owes a duty to the receiver of a telegram. Bigelow's *Leading Cases on Torts*, p. 626.

(*e*) 11 Q.B.D. (1883) 503.

"Wherever the circumstances disclosed are such that, if the person charged with negligence thought of what he was about to do, or to omit to do, he must see that, unless he used reasonable care, there must be at least a great probability of injury to the person charging negligence against him, either as to his person or his property, then there is a duty shewn to use reasonable care (*f*).

In the same case Lord Justice Fry furnished a third formulary:

"One may lay down with some safety that, where a man without contract does something to another man, and the first man knows that, if he does the act negligently, that negligence will in all probability produce injury to the person or property of the second man, there the first man owes the second a duty to do the act without negligence."

These propositions, it will be observed, bring out with reasonable clearness the fundamental fact noticed at the beginning of this article that the likelihood of a certain person's being injured is as much within the scope of the natural and probable consequences for which a negligent person is liable as the likelihood that the physical event which constitutes the injury will occur. At present, however, it must be admitted that, logically unexceptionable as they appear to be, the opinion of the majority of the Court of Appeal in *Heaven v. Pender*, supra, as well as the reasoning in the case of *Caledonia R. Co. v. Mulholland*, (*g*) must be taken to shew that they are not yet accepted as correct statements of the law. That they could not be accepted without overruling at least a part of the cases cited above is manifest. In subsequent cases even Lord Esher seems somewhat to restrict the scope of his doctrine by declaring that the duty upon the breach of which an action for negligence is founded is that a man is bound not to do anything negligently so as to hurt a person near him, and that the whole duty arises from the knowledge of that proximity (*h*). Whether he really intended to recede from his original views it is not easy to determine, but evidently it would be necessary to strain this later language very considerably to make it cover the cases which are really the most troublesome of all, viz., those in which the injurious agency was not under the defendant's control at the time of the accident.

(*f*) *Cunnington v. Great Eastern R. Co.* (1883) 49 L.T.N.S. 392.

(*g*) (1898) A.C. 216.

(*h*) *Thomas v. Quartermaine* (1887) 18 Q.B.D. 685 (p. 688); *Le Lievre v. Gould* (1893) 1 Q.B. 491. Compare also the language used by Smith, L.J. in the latter case (p. 504).

XIII. Our article may be appropriately concluded by some brief criticisms on the *argumenta ab inconvenienti* by which certain judges have undertaken to justify the present limitations of the range of responsibility. In that class of cases in which a person loses a benefit intended for him owing to the negligence of a professional man in carrying out the instructions of another party, the doctrine that the loser of the benefit cannot claim damages for such negligence has been defended on the ground that to allow such an action would lead to the result that a disappointed legatee might sue the testator's solicitor for negligence in not causing the will to be duly signed and attested, though he might be an entire stranger both to the solicitor and the testator (a). Here under the circumstances supposed, the solicitor could not be called to account by his employer, who, by hypothesis, would be dead when the delinquency bore its fruits, nor by the representatives of the decedent, who would obviously be profited rather than damaged by the negligence which invalidated the legacy. The argument, therefore, was simply an attempt to justify the refusal of a right of action to the only person who could shew actual damage by adducing a similar case in which the professional man would also escape scot-free if he could not be sued by the person injured. Surely a very neat and convincing piece of logic! The reasoning here employed is, as we have already pointed out, wholly inconsistent with that which is used to sustain the right of a patient to sue a medical man not retained by him (VII. ante).

In another class of cases great reliance has been placed upon an argument of a similar stamp, viz., that it would be unjust, after a contractor for the supply of some article of commerce has done everything to the satisfaction of his employer, to allow the transaction to be reopened by one not privy to it. The credit, such as it is, of first promulgating this theory is apparently due to the judge whose fertile imagination clinched the doctrine of the servant's assumption of the risks of his employment by reasoning of a like sort (b). In *Winterbottom v. Wright* (c) where it was held that a manufacturer who had furnished the Postmaster-General with a coach, for which another person supplied the drivers and

(a) *Robertson v. Fleming* (1861) 4 Macq. 167.

(b) See *Priestley v. Fowler* (1837) 3 M. & W. 1.

(c) 10 M. & W. (1842) 109.

horses, was not liable to one of those drivers for an injury caused by the breaking of a defective axle, Lord Abinger was strongly influenced by these considerations: "If the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue" The same kind of language constantly makes its appearance in later cases (*d*).

The argument seems to amount, broadly speaking, to this,—that to compel a negligent workman to indemnify each and every person who might be injured by his negligence would be inexpedient and unjust, for the reason that it would widen unduly the circle of liability, thus producing excessive intricacy of actions, and creating conditions of responsibility which would deter prudent men from engaging in certain occupations. As to the first of the results, here held out in terrorem, it seems sufficient to say that even if the practical difficulties involved in the task of fixing responsibility upon the proper party were in some cases as grave as the argument assumes, it does not by any means follow that the courts should decline the task altogether. With regard to the suggested discouragement of enterprise, the ground might be taken reasonably enough that, until the matter has been brought to the test of experience, the burden of proving that this would be the consequence of widening the circle of responsibility, lies upon those who make the assertion, and that this burden is not discharged by the mere ipse dixit of any judge, however eminent he may be. Indeed, one might go still further and say that, as this argument emanated originally from a judge whose arguments of a very similar type in support of the doctrine of common employment have been sig-

(*d*) It will be sufficient to instance the following remarks by Willes, J. in *Collis v. Selden* (1868) L.R. 3 C.P. 495, where a visitor to a public-house was injured by the fall of a chandelier: "There would be no end of actions if it were held that a person having once done a piece of work carelessly, should, independently of honesty of purpose, be fixed with liability in this way by reason of bad materials or insufficient fastening." The varia lectio in the Law Journal Reports is interesting: "To hold that the mere fact of a man having once done some negligent work is to fix him at any future time with the consequent damage to a stranger, because by accident bad materials were used, or there was momentary carelessness, would be going beyond what has been decided." 37 L.J.C.P. 233. The same theme has been worked out with still greater elaboration and amplitude by American judges. See *Kahl v. Love* (1874) 37 N.J.L. 5; *Curtin v. Somerset* (1891) 140 Pa. St. 70, 12 Lawy. Rep. Ann. 322.

nally confuted by the logic of events since the abolition of that doctrine by the Employers' Liability Act of 1880, his reasoning is rather more likely than not to be unsound. The plain truth, of course, is that the opinion of a lawyer upon the probable operation of economic forces is of just as great or as little value as that of a layman of equal intelligence and with the same knowledge of the subject.

Nor is this all. It is, we think, by no means difficult to shew that the inconveniences to which it is declared that manufacturers and vendors of chattels would be subjected by holding them liable to strangers, are much less serious than the courts would have us suppose. To read the passages in which judges have expatiated upon the withering effects of an extension of liability, one would imagine that a single defect in a chattel might be pregnant with peril to a limitless number of people. Yet a little consideration will shew that a long succession of accidents from any particular imperfection in the same article, though theoretically possible, would be quite inconsistent with the ordinary experience of everyday life. Such a defect almost invariably exhausts its potential capacity for mischief when it has produced its first injury after the article has left the possession of the manufacturer or seller, for, in the normal course of business, the occurrence of a single accident suggests and brings about the disuse of the article or its restoration to a state of good repair. And in any event, after the existence of the defect has been revealed by the infliction of an injury or otherwise, the responsibility for the future condition of the article will upon the undisputed principles of legal causation be shifted to the person in possession. There is no apparent reason, therefore, why the responsibility should not in any event remain with the manufacturer or seller until the defect has been actually brought to light by an accident, or until a duty falls on the person in possession to examine the article for the purpose of ascertaining whether its quality has deteriorated, and there is at least one good reason why this doctrine should prevail. Evidently the present rule will not infrequently so operate that no one at all can be brought to account for injuries caused by a dangerously defective chattel—a situation much more “outrageous” than any of those which have suggested themselves to Lord Abinger and other judges. Such a case arises where the inspection which would have led to a disclosure of the defect is one which it was the duty of the seller to make but which it would be unreasonable to require the purchaser to make, as

where the defect could not have been discovered without special skill and knowledge, which the seller possesses and the purchaser lacks. Transactions presenting this feature occur whenever a manufacturer sells machinery or a chemist sells drugs. As a general rule, the customers would be justified in assuming that the articles bought were in such a condition that they may be safely used, although they might have latent defects of which the vendors should have been aware (e). Whenever that assumption is justified, it is clear that, if a stranger, such as a servant of the purchaser, suffers injury from the defective quality of the article purchased, the effect of the present rule will be that he cannot claim an indemnity from the manufacturer because there is no contract between them, nor from the purchaser because he has not been wanting in due care. The injustice of denying a remedy under these circumstances against the only person who has been guilty of negligence is not disguised by the use of the convenient expression, *damnum absque injuria* (f). The supposed situation, in fact, whatever gratification it may afford to a connoisseur of disagreeable logical dilemmas, is simply shocking to common sense. That modern judges, with a few exceptions, should still refuse to admit that there is anything incongruous or unsatisfactory in the doctrines which lead up to it, shews how far even the most robust intellects may, under our system of case law, be carried away from a scientific theory of liability by following precedents which, when analysed, seem to rest ultimately on no more solid basis than doubtful inferences from the mere technicalities of pleading and equally doubtful considerations of social and economic expediency. Additional support for these doctrines, it may be, can be found in some of those secondary principles with which the accidents of historical development have so richly endowed our law. But it is difficult to admit that these can furnish an adequate warrant for a situation so repugnant to elementary physical and

(e) See the comments of Brett, M. R., in *Cunnington v. The Eastern R. Co.* (1883) 49 L. T. N. S. 392, on *George v. Skivington* (1869) L.R. 5 Exch. 1. The doctrine stated in the text is clearly a necessary corollary from the principles which define the relations between an independent contractor and his employer, and is so treated by the American courts in the cases which have established the right of a purchaser to rely to a very great extent on the quality of an article bought from a reputable manufacturer. See *Carlson v. Phoenix Bridge Co.* (1892) 132 N.Y. 273; *Reynolds v. Merchants Woollen Co.* (1897) 168 Mass. 501.

(f) See the opinion of Rolfe, B., in *Winterbottom v. Wright* (1842) 10 M. & W. 109.

metaphysical standards as that which results from allowing a few individuals to create by contract a sphere of responsibility within which, except in the instances noted above, they are accountable only to one another. Unexceptionable grounds of public policy might justify what virtually amounts to a license to disregard with impunity, up to a certain point, the safety and welfare of the members of the community outside this artificial circle. But it is not easy to see what arguments derived from this source can be of any avail, when it is not apparent that the prevailing doctrines are in any case necessary for the reasonable protection of the contracting parties, and it is certain that they must at least be productive of injustice to the extent of frequently leaving those who suffer in their persons or property, through a breach of the contract, entirely without a remedy.

C. B. LABATT.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act.)

BILL OF SALE—DESCRIPTION OF PROPERTY—BILLS OF SALE ACT, 1882 (45 & 46 VICT., c. 43), s. 4—(R.S.O. c. 148, s. 32).

Davies v. Jenkins (1900) 1 Q.B. 133, turns partly on the sufficiency of a description of property in a bill of sale, and that is the only point for which it is necessary here to refer to the case. The property, purported to be covered by the bill of sale in question, consisted of farm stock and implements. In the schedule the farm stock was described as "stock: 2, horses, 4 cows," and this was held to be an insufficient description. The English Act, 45 & 46 Vict., c. 43, s. 4, requires the property intended to be affected to be "specifically described." The Ont. Act, R.S.O. c. 148, s. 32, requires such sufficient and full description of the chattels that the same may be thereby readily and easily known and distinguished, and it would seem that at least as specific a description is necessary under this Act as under the English Act. On this point *Boldrick v. Ryan*, 17 Ont App. 253, and *Corneill v. Abell*, 31 C.P. 107, may be referred to.

VENDOR AND PURCHASER—AGREEMENT BY VENDOR TO PAY SECRET COMMISSION TO AGENT OF PURCHASER—RIGHT OF PURCHASER TO RECOVER COMMISSION AGREED TO BE PAID BY VENDOR.

In *Grant v. The Gold Exploration Syndicate* (1900) 1 Q.B. 233, the plaintiff sought to recover from the defendants the amount of a promissory note given by the defendants as part payment of the purchase money for certain mining property sold by the plaintiff to the defendant company. The sale was negotiated by one Govan, who was then a director of the defendant syndicate, and to whom the plaintiff privately agreed to pay a commission of ten per cent. on the total purchase money received. After the price was fixed, and before payment, the plaintiff became aware that Govan was a director of the syndicate, but the agreement to pay the commission was not disclosed by the plaintiff to the defendants. Part of the purchase money was paid in money and shares, and the plaintiff paid ten per cent. of the sum received, and assigned to the nominee of Govan ten per cent. of the shares. Before the balance became due the plaintiffs asked Govan to get the defendants to pay part in cash, and give the note now sued on for the balance. This Govan did, and at the same time agreed to forego £500 of the commission he was entitled to. Before the note matured the defendants discovered that Govan had received the shares and money in part payment of his commission, and on demand he paid over the money and transferred the shares to the syndicate in full satisfaction of their claim against him. The defendants now claimed that they were also entitled to recover from the plaintiff the £500 which Govan had agreed to forego. Bigham, J. was of opinion that the defendants knowing all the facts had elected to treat their right as barred by the second agreement reducing the commission, and were therefore not entitled to recover the £500; but the Court of Appeal (Smith, Collins, and Williams, L.JJ.) were unanimously of opinion that the agreement by Govan made after the plaintiffs knew his fiduciary position was not binding on the defendants and that they were entitled to the £500 in question.

CROWN—PREROGATIVE OF CROWN—ACTION BETWEEN SUBJECTS AFFECTING RIGHTS OF CROWN—INFORMATION—STAY OF PROCEEDINGS.

In *Stanley v. Wild* (1900) 1 Q.B. 256, the plaintiff had brought an action of trespass in the County Court against tenants of the Crown, and recovered judgment therein for damages, and an injunction to restrain future trespasses, thereupon the Attorney-

General, being of opinion that the rights of the Crown were affected, filed an information in the High Court asking a declaration as to the rights of the Crown in the premises, and he then applied to remove the County Court action into the High Court and stay the proceedings therein until after the hearing of the information. The Divisional Court (Darling and Ridley, JJ.) granted the application, and the Court of Appeal (Smith and Williams, L.JJ.) upheld this decision, notwithstanding judgment had been obtained in the County Court action, the court being of opinion that the Crown had a prerogative right to have the action removed at any stage of the proceedings.

BANKRUPTCY—"EXECUTION COMPLETELY EXECUTED"—(R.S.O. c. 147, s. 11).

In re Ford (1900) 1 Q.B. 264, discusses the provisions of the English Bankruptcy Act, which are somewhat similar in effect to R.S.O. c. 147, s. 11. The contest was between the official receiver and certain execution creditors of the bankrupt as to the right to certain moneys received by the execution creditors on account. The facts were shortly as follows:—On 31st Dec., 1898, the sheriff levied under an execution for £80 and costs; on the 5th January, 1899, the debtor paid the execution creditors £40 on account and agreed that the sheriff might re-enter in case of non-payment of the balance by instalments; the sheriff then withdrew and on 14th January, 1899, a receiving order was made. The Divisional Court (Wright and Channell, JJ.), held that under the circumstances the execution had not been "completely executed" even pro tanto as to the £40 paid, and that the official receiver was entitled to recover that sum from the execution creditors.

TROVER—ORDER FOR PAYMENT OF MONEY—CONVERSION OF NON-NEGOTIABLE INSTRUMENT—MONEY HAD AND RECEIVED—DAMAGES.

In *Bavins v. London and S. W. Bank* (1900) 1 Q.B. 270, the plaintiffs sued for damages for the conversion of an order for payment of money, the proceeds of which had been collected by the defendants under the following circumstances, or in the alternative for money paid and received. The order in question was received by the plaintiffs from a company and was directed to the company's bankers, and directed the payment of a certain sum, subject to the condition that the plaintiffs should sign a receipt annexed. The order and receipt were stolen from the plaintiffs, and were subsequently paid in by a customer of the defendants bearing an indorsement not signed by the plaintiffs, and a forged

signature to the receipt. The defendants credited the customer with the amount of the order, and subsequently collected the amount of it from the bankers on whom it was drawn. Kennedy, J. held that the plaintiffs were entitled to recover the full amount received by the defendants, and his judgment was affirmed by the Court of Appeal (Smith, Collins and Williams, L.J.J.). It was contended on the appeal, that as the instrument was not a negotiable instrument it was only evidence of a debt, and therefore only nominal damages were recoverable for its conversion, but the Court of Appeal considered that even if the measure of damages for the conversion of a non-negotiable instrument be nominal, the plaintiffs were nevertheless entitled to recover the full amount claimed by them, as money had and received.

COPYRIGHT—MUSIC—INFRINGEMENT OF COPYRIGHT—PERFORATED MUSIC SHEET FOR MECHANICAL ORGAN—MUSICAL DIRECTIONS ON PERFORATED SHEET—COPYRIGHT ACT 1842 (5 & 6 VICT., c. 45) SS. 2, 15—(R.S.C. c. 62, s. 32).

Boosey v. Wright (1900) 1 Ch. 122, is the case in which Stirling, J. decided (1899) 1 Ch. 836 (noted ante vol. 35 p. 628), that a perforated sheet of paper for use in a mechanical organ called an Eolian, was not an infringement of the copyright of the plaintiff in the musical compositions intended to be produced by such perforations, when passing through the instrument, but that the directions to the performer for regulating the time and expression of the music, were an infringement. The Court of Appeal (Lindley, M.R., Jeune, P.P.D. and Romer, L.J.) have now affirmed the judgment of Stirling, J., that the perforated sheet was not an infringement, but they have also held that neither are the directions for regulating the time and expression, etc., and on this point they have reversed his judgment, and dismissed the action with costs.

LANDLORD AND TENANT—COVENANT BY TENANT TO PAY "ALL TAXES, RATES, DUTIES AND ASSESSMENTS PAYABLE IN RESPECT OF THE DEMISED PREMISES"—COSTS OF COMPLETING DRAINAGE WORKS REQUIRED BY MUNICIPALITY UNDER STATUTE.

In *Farlow v. Stevenson* (1900) 1 Ch. 128, the action was brought by a landlord against his tenant on a covenant in the lease whereby the tenant covenanted to pay "all taxes, rates, duties and assessments, whatsoever which now are, or hereafter shall become payable for in respect of the premises hereby demised, or any part thereof, whether parliamentary, parochial or otherwise, except the landlord's property tax." In pursuance of statutory authority in

that behalf, the parochial authorities served notice requiring the drains on the premises to be reconstructed; by arrangement between the plaintiff and defendant the works were carried out by the plaintiff at an expense of £143 without prejudice to the rights of either party. *Byrne, J.* following *Brett v. Rogers* (1897) 1 Q.B. 525 (noted ante vol. 33 p. 424), held that the tenant was liable, and his decision was affirmed by the Court of Appeal (*Lindley, M.R., Jeune, P.P.D. and Romer, L.J.*) The word "duties" appears to have been the crucial word, and was held to be wider in its effect than "impositions," which in *Tidswell v. Whitworth*, L.R. 2 C.P. 326, was held not to cover claims of the kind in question in the present case.

CHARGE ON LAND—EXPRESS TRUST—TWO SUMS SECURED BY SAME TERM—
 STATUTE OF LIMITATIONS—REAL PROPERTY LIMITATION ACT, 1874 (37 & 38
 VICT. C. 57), SS. 8, 10—(R.S.O. C. 133, SS. 23, 24)—POWER OF APPOINTMENT
 —EXERCISE OF POWER BY GENERAL BEQUEST, EFFECT OF—WILLS ACT, 1837
 (7 W. 4 & 1 VICT. C. 26), S. 27—(R.S.O. C. 128, S. 29.)

In Williams v. Williams (1900) 1 Ch. 152, two questions are involved, the first as to the effect of the Statute of Limitations (37 & 38 Vict. c. 37, ss. 8-10 on the right to recover moneys secured upon land by a term vested in trustees, under a settlement; and the second as to the effect of the exercise of a power of appointment by general bequest upon the fund appointed. As regards the first point, the facts were briefly as follows:—By a settlement, an estate was conveyed to trustees for a term of 500 years upon trust to raise £2,000 on the death of Anne Hartley, and £2,000 on the death of Griffith Williams. Griffith Williams died in 1860 and no proceedings were taken to raise the money until the present action, which was commenced in 1898. Anne Hartley died in 1886 and this action was commenced within 12 years of her death. It was contended that the trust to raise these sums was not an express trust and therefore the £2,000 raisable on Williams' death was not affected by the Real Property Limitation Act, s. 10, (R.S.O. c. 133, s. 24), and it was also contended that as the action was brought in time as to the £2,000 raisable on Anne Hartley's death the trustees were entitled to possession for the purpose of raising that sum, and, being in possession, they might then raise the other £2,000 also. But North, J. overruled both these contentions and held that the money was payable under an "express trust" within the meaning of s. 10, and therefore as to the

£2,000 raisable on Williams' death the right of the trustees was barred by the Statute, and that the two sums of £2,000 were separate and distinct, and the fact that the trustees had the right to raise one of them did not carry with it any right to raise the other as to which their right was barred by the statute. With regard to the second point, North, J. held that where a general power of appointment is executed by virtue of a general bequest, under the Wills Act, s. 27, (R.S.O. c. 128, s. 29), the effect of such an execution of the power is to place the property subject to the power, in precisely the same position as the testator's personal estate, and equally liable therewith for the payment of his debts and legacies. See R.S.O. c. 163, s. 8.

LEASEHOLD—TENANT FOR LIFE—PERMISSIVE WASTE.

In re Parry and Hopkin (1900) 1 Ch. 160, a testator bequeathed to his wife for her life certain leaseholds. The leases under which the testator held contained covenants on his part to repair. The testator's widow entered and enjoyed the premises till her death, but omitted to observe the covenants to repair, and the present proceedings were brought by the person entitled in remainder to compel her estate to pay for the alleged dilapidations to the property suffered during her life, and the claim having been referred to arbitration, a case was stated by the arbitrator. North, J. following *Re Cartwright* (1889) 41 Ch. D. 532, held that the estate of the tenant for life was not liable: see *Patterson v. The Central Canada L. & S. Co.*, 29 O.R. 134, where a similar conclusion was reached by a Divisional Court.

ADMINISTRATION—INSOLVENT ESTATE—ANNUITY—APPROPRIATION OF CAPITAL SUM TO PURCHASE OF ANNUITY—MARRIED WOMAN—RESTRAINT ON ANTICIPATION—DEATH OF ANNUITANT—REPRESENTATIVES, RIGHT OF, TO UNEXPENDED SUM APPROPRIATED TO PURCHASE OF ANNUITY.

In re Ross, Ashton v. Ross (1900) 1 Ch. 162, the suit was for administration of a testator's estate, which proved to be insolvent, and the dividend on the capital value of an annuity bequeathed by the testator to a married woman for life, without power to anticipate the growing payments thereof, was ordered to be laid out in the purchase of an annuity for her. Before the purchase was made the annuitant died and the annuitant's personal representative claimed to be entitled to the money. Those interested in the testator's estate claimed, on the other hand, that the money should go back to the testator's estate. North, J. decided in favour of the

annuitant's representative, on the ground that the only reason why the money was directed to be laid out in the purchase of an annuity instead of being paid to the deceased annuitant in her lifetime, was because of the restraint on anticipation; and that if her husband had predeceased her she would have been entitled to have the money at once paid to her, he therefore thought that she had acquired such an absolute interest in the fund, that on her death it was part of her estate, and passed to her personal representative.

TRUSTEE—BREACH OF TRUST—SALE BY LIQUIDATOR TO HIMSELF—FIDUCIARY RELATION—CONCEALMENT—SETTING ASIDE SALE—ACCOUNT OF PROFITS—INTEREST ON PROFITS.

Silkstone & H. M. Coal Co. v. Edey (1900) 1 Ch. 167, was an action brought by the plaintiff company which was being wound up under the supervision of the court, against Edey, one of the liquidators, and a company to which he had purported to sell the assets and undertaking of the plaintiff company, on the ground that Edey himself was really the purchaser, and that the defendant company was a mere trustee for him. Judgment was given for the plaintiffs setting aside the sale, and directing an account of the profits received by the defendants since the sale. A question arose in settling the minutes of the judgment as to whether the defendants were also chargeable with interest on such profits from the date of the withdrawal thereof from the business of the defendant company. Stirling, J. was of opinion that the claim to interest on the profits should not be allowed, on the ground that the settled practice of the court appeared to be that where a sale is set aside under such circumstances, the trustee or purchaser is chargeable with the profits received, but not with interest thereon.

MARRIED WOMAN—ADMINISTRATRIX—DEFAULT BY MARRIED WOMAN IN PAYMENT OF TRUST FUND—ATTACHMENT—ORDER FOR PAYMENT AGAINST MARRIED WOMAN, FORM OF—MARRIED WOMAN'S PROPERTY ACT, 1892 (45 & 46 VICT. c. 75), s. 1, sub-s. 2; ss. 18, 24—(R.S.O. c. 163, s. 2, s. 3, sub-s. 2; s. 20).

In re Turnbull, Turnbull v. Nicholas (1900) 1 Ch. 180, the defendant, a married woman, was the legal representative of a deceased person for whose estate she was, by orders made in the action, required to account. As the result of the account a sum of money was found to be in her hands, and she was ordered to pay the amount into court, and having failed to comply with the order, a motion was made for an attachment against her. On the hearing of the motion it was agreed that the defendant should be at liberty

to object to the form of the order, and it was contended on her behalf that it was erroneous, and instead of being a personal order for payment against her, it should have been framed in the form of a judgment as settled in *Scott v. Morley*, 20 Q.B.D. 120, but Stirling, J. considered the order was in proper form as it did not appear that she had committed a devastavit, and that on non-compliance with it she was liable to attachment, which he granted, but subsequently on an affidavit being produced that she had committed a devastavit in respect of the fund, and medical testimony being given that imprisonment would seriously endanger her life, the Court, upon the latter ground, directed all proceedings to be stayed.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

N.S.] HANDLEY *v.* ARCHIBALD. [Nov. 29, 1899.

Partition of land—Tenants in common—Statute of limitations—Possession.

Under the Nova Scotia Statute of Limitations (R.S.N.S. 5 ser. c. 112) a possession of land in order to ripen into a title and oust the real owner must be uninterrupted during the whole statutory period. If abandoned at any time during such period the law will attribute it to the person having title.

Possession by a series of persons during the period will bar the title though some of such persons were not in privity with their predecessors.

Where one of two tenants in common had possession of the land as against his co-tenant, the bringing of an action of ejectment in their joint names and entry of judgment therein gave a fresh right of entry to both and interrupted the prescription accruing in favour of the tenant in possession.

Judgment of the Supreme Court of Nova Scotia (32 N.S. Rep. 1) affirmed. Appeal dismissed with costs.

Harrington, Q.C., for appellant. *Newcombe*, Q.C., and *Kenney*, for respondent.

Province of Ontario.

HIGH COURT OF JUSTICE.

Trial of Action. MacMahon, J.]

[Feb. 19.

KELLY v. DAVIDSON.

Employer's liability—Master and servant—Negligence—Evidence.

The plaintiff, while working for some contractors who were building a house, was injured through a fall caused by the giving way of part of the scaffolding of the house. The scaffold he was standing on consisted of a single plank about fifteen feet long, one end of which rested on a trestle and the other on a stay formed of a plank nailed to two upright posts forming a part of the main structure. The stay as originally fastened to the posts was perfectly secure, as the plank forming the stay rested on its edge on a cleat securely fastened to the posts by spikes, the stay itself being securely fastened to the posts by large spikes. The general superintendant of the defendants' works had been very explicit in directing the workmen that the stays should be put up and secured as this one had been. Two workmen, however, removed the stay for purposes of their own convenience about three o'clock on September 7, and raised it about a foot above the cleat and nailed it to the posts in a manner which rendered it dangerous. On the following morning, between eight and nine o'clock, the plaintiff and another being directed by the foreman to cut off the ends of two beams at the top of the third storey, the plank referred to was thrown across from the trestle to the stay, and the plaintiff mounting it, the stay gave way and the injury happened.

Held, that there was no evidence of negligence on the part of the foreman, so short a time having elapsed between the removal of the stay and the accident, such removal of the stay, upon which so much trouble had been taken to make it secure, being the last thing a foreman would expect, nor was the fact that after such change was made the plank was up higher at one end than the other sufficient to indicate to him that there had been a change, nor had it caused any comment on the part of the plaintiff who saw the plank placed in position before mounting it.

H. E. Irwin and Harris, for plaintiff. *Clute*, Q.C., and *A. R. Clute*, for defendants.

FRASER v. DREW.

[Feb. 20.

New trial—Verdict—Finding of jury—Question of fact—Misapprehension.

Where a case has been properly submitted to the jury and their findings upon the facts are such as might be the conclusions of reasonable men, a new trial will not be granted on the ground that the jury misapprehended or misunderstood the evidence, notwithstanding that the trial judge was dissatisfied with the verdict.

Drysdale, Q.C., for appellant. *Harris*, Q.C., for respondent.

Boyd, C., and Robertson, J.]

[Feb. 10.

IANSON v. CLYDE.

Executor and administrator—Judgment against executors—Evidence of testator's debt—Endorsement of note by executors—"without recourse"—Devolution of Estates Act—Caution—After twelve months—Effect of—"In the hands" of executors—Estate—Devise.

A judgment against executors of an estate is only prima facie evidence of its being for a debt due by the testator, and the parties interested in the real estate are at liberty to disprove it.

In an action by a judgment creditor on a judgment recovered on a note discounted by him, which note was received by the executors for the sale of personal property of the testator and endorsed "without recourse" to the plaintiff,

Held, that the endorsement of the note by the executors would not make it a debt of the testator in the hands of the endorsee.

Held also, that the effect of the Devolution of Estates Act and amendments, acted upon by the registration of a caution under the sanction of a County Judge after the twelve months has expired, is to place lands of a testator again under the power of his executors so that they can sell them to satisfy debts, and that the expression, "in the hands" of executors, as applied to property of the testator, is satisfied if it is under their control or saleable at their instance, and that the operation of a devise of lands is only postponed for the purposes of administration, and that the estate does not pass this through the medium of the executors but by the operation of the devise.

Aylesworth, Q.C., and S. H. Bradford, for appeal. *Clute, Q.C., and Yarnold*, for defendants other than executors. *Ormiston*, for John Clyde, an executor. *Slaght*, for Thomas Allin, the other executor.

MacMahon, J.]

Feb. 14

TRUSTS AND GUARANTEE COMPANY v. TRUSTS CORPORATION OF ONTARIO.

Limitation of action—Annuity by will—Charge on lands—Arrears—Disability.

A testator by his will devised land to two of his sons, their heirs and assigns forever, subject to the payment of \$200 per annum for the benefit of another son (a lunatic) for his life, payable "to the person who may be his guardian," and died in 1872. The son lived with his mother, and payments were made to her for his support from 1880 to 1889, the last payment being made in February, 1889. The plaintiffs were appointed committee for the son in December, 1898.

Held, following *Hughes v. Cole* (1884) 27 Ch.D. 231, that the annuity was charged on the land, and that the right to recover was not barred as to future payments of the annuity out of the land; that the payments made to the mother were discharges pro tanto of the annuity; that as the son was

under a disability until the plaintiffs' appointment, and as twenty years are allowed within which to bring an action in such a case, they were entitled to recover the annuity from February, 1890, and as the annuity was an express charge on the land, it might be sold to satisfy the arrears.

Claude Macdonell and J. T. C. Thompson, for plaintiffs. Aylesworth, Q.C., and C. A. Moss, for defendants.

Boyd, C., Ferguson, J., Robertson, J.]

[March 2.

RICKETTS v. VILLAGE OF MARKDALE.

*Municipal corporations — Negligence — Children playing on highway—
Traffic and passage—Repair—Lord Campbell's Act—Loss of child—
Damages—Reasonable expectation of pecuniary benefit.*

Children are entitled to play upon highways where there is no prohibitory local law and where their presence is not prejudicial to their ordinary user for traffic and passage, and municipal corporations are bound to keep them in repair, and are responsible for damages sustained by any person by reason of default in so doing. Constitution and characteristics of highways and streets in England and Canada compared.

In an action under Lord Campbell's Act by a parent for the death of his child by the negligence of the defendant, it is not necessary to shew that any pecuniary benefit had been actually received, but such a reasonable and well-founded expectation of pecuniary benefit as can be estimated in money and so become the subject of damages is sufficient. Judgment of FALCONBRIDGE, J., reversed.

W. H. Blake, for the appeal. J. B. Lucas and W. H. Wright, contra. W. J. Hatton, for third party.

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NO. 8.

APPEALS FROM COUNTY COURTS. (ONTARIO.)

Section 52 of The County Courts Act gives a right of appeal to a Divisional Court of the High Court of Justice in three classes of cases :—

1. " From every decision made by a Judge of a County Court under any of the powers conferred upon him by any rules of Court or any statute, unless provision is therein made to the contrary ; and "

2. " From every decision or order made by a Judge of a County Court sitting in Chambers under the provisions of the law relating to interpleader proceedings, the examination of debtors, attachment of debts and proceedings against garnishees ; and "

3. " From every decision or order made in any cause or matter disposing of any right or claim."

The section is limited in its operation by this concluding proviso — " provided always that the decision or order is in its nature final and not merely interlocutory." The proviso applies to all of the three classes of cases : *Baby v. Ross*, 14 P.R. 440.

In some instances there is difficulty in determining whether or not an appeal will lie from a particular order or decision, from which an appeal is desired, inasmuch as there has not in any of the decided cases been formulated any test which will apply to determine whether an order or decision within the section is " in its nature final " or " merely interlocutory."

The test applied under the English Rules governing the time for appealing from final and interlocutory orders will not apply under the proviso ; the language of the proviso precludes the application to it of that test : *Bank of Minnesota v. Page*, 14 A.R. 347.

The language of the proviso indicates that the test to be applied under it must bear upon the character of the subject matter adjudicated upon, whereas the test under the English Rules relates not to the nature of the order, but to the position it occupies in its relation to the action as a whole : *Salaman v. Warner*, L.R. (1891) 1 Q.B. 734.

The word "final" as ordinarily employed has a dual meaning ; it means "decisive" and "the last." Usually the word denotes both character and position ; but in the proviso the context confines it to the one meaning "decisive" in which sense, being applied to a decision or order, it must have reference to the character of the subject matter adjudicated upon.

The word "interlocutory," on the other hand, as ordinarily employed has a single meaning, i.e., "intermediate." Usually it denotes position or relation only, and therefore an interlocutory order may be "in its nature final." This use of the word is common ; a striking instance is found in the judgment of Mr. Justice Osler in *Hately v. Merchants' Despatch Co'y*, 12 A.R. 640, in which case, when discussing the question whether an order directing the delivery out of Court of a bond for cancellation, which had been given as security for costs, was an interlocutory order under sec. 53 of the then Judicature Act, he said at p. 653, "It is admittedly, though final in its nature, an interlocutory order."

Every order which occurs in practice embodies a decision on some point or other and is decisive as regards that particular point, and in this strict sense no order can be said to be interlocutory and nothing more, or "merely interlocutory," and if, in the construction of the proviso, this strict sense of the words was to be adhered to, every decision or order within the section would be appealable, and the proviso would be nugatory.

Manifestly such could not have been the intention of the Legislature, and a consideration of the object of the section will aid in determining what the real intention was, and what meaning is to be attached to the controlling proviso.

Apart from statutory provision there could be no appeal, and the plan of the section is, first to confer a right of appeal from every decision or order within any of the three classes, then by the proviso to limit that right to those decisions and orders which answer the description in the proviso contained. The effect is that those orders and decisions which do not answer the description are without the statute and are consequently not appealable. It was thought by the Legislature that the matters included in the section were of sufficient general importance to warrant a right of appeal being given to a Superior Court from decisions in the County Court affecting such matters, and it is conceived that the Legislature had in mind, in enacting the proviso, the relative importance

and unimportance of the subject matters covered by the decisions, from which it was intended to confer or exclude the right of appeal, and that it was intended to give the right of appeal respecting the relatively important matters and to exclude it respecting the relatively unimportant matters.

Having regard then to the ordinary significations of the phrases "final in nature" and "merely interlocutory" and to the intention of the Legislature, it is submitted that an order within the section which embodies a decision on a matter of substantial right in controversy between the parties and which concludes those parties respecting such matter in the tribunal pronouncing the decision, though it be interlocutory in relation, is an order "final in its nature and not merely interlocutory," and is, therefore, appealable.

An order within the section which is final in the dual sense of that word is, no doubt, appealable, and, it is submitted, the only orders within the section which are not appealable are those which, being made intermediate between the initial and final process, do not embody decisions on matters of substantial right.

The following references may be profitably consulted :— *Whiting v. Hovey*, 12 A.R. 119, per Patterson, J.A. at p. 125 ; *Hately v. Merchants' Despatch Co'y*, 12 A.R. 640, per Patterson, J.A., at p. 649 ; *McPherson v. Wilson*, 13 A.R. 339 ; *Weaver v. Sawyer*, 16 A.R. 422-428 ; *Island v. Tp. Amaranth*, 16 P.R. 3 ; *The Rural Municipality of Morris v. The London and Canadian Loan and Agency Company*, 19 S.C.R. 434, per Patterson J. at p. 439, et seq.

Toronto.

J. E. IRVING.

 ENGLISH CASES.

 EDITORIAL REVIEW OF CURRENT ENGLISH
DECISIONS.

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COVENANT — TIED PUBLIC HOUSE — MORTGAGOR — MORTGAGEE — ASSIGNS —
UNDERLESSEE WHEN BOUND BY RESTRICTIVE COVENANT — NOTICE - FIRM,
COVENANT FOR BENEFIT OF.

In *John Brothers v. Holmes* (1900) 1 Ch. 188, the plaintiffs sued to restrain the defendant from selling beer, etc. on certain premises other than such as should have been supplied by the plaintiffs. The premises in question were leasehold, and were subject to two mortgages. The plaintiffs claimed as assignees of the second mortgage which contained a covenant binding the mortgagor to sell only beer, etc. supplied by the mortgagee's firm of "John Brothers." The covenant was made with the members of the firm, their executors, administrators and assigns, and purported to bind the public house on the premises to John Brothers for the entire supply of beer so long as the mortgagor, his executors, administrators or assigns should be in possession of the premises. The plaintiffs besides being assigns of the second mortgage and the covenant, were also assigns of the business of "John Brothers." The defendant claimed under an underlease made by the mortgagor when in possession to which the first mortgagee was also a party, and though he had taken with notice of the restrictive covenant on which the plaintiffs relied, he claimed that he was not bound by it, as he derived title from the first mortgagee, and further that as an underlessee, he was not an "assign" of the covenantor within the meaning of the covenant. Kekewich, J. was of opinion that the plaintiffs were entitled to succeed, holding that the covenant though made with the individual partners was intended for the benefit of the business of the firm, and that the plaintiffs as assignees of the mortgage and business were entitled to enforce it. He also considered that as the Conveyancing Act, 1881, s. 18, expressly empowers a mortgagor in possession to make a valid lease as against every incumbrancer, the defendant must be considered to be in under the title conferred by the mortgagor, and could not escape liability under the covenant as lessee of the first mortgagee, and that the covenant was wide enough to bind all persons claiming under the mortgagor. Sec. 18 of the Convey-

ancing Act, 1881 does not seem to have been adopted in Ontario, and it is therefore possible that under the same circumstances a different conclusion might be reached in Ontario as to the right to set up the title derived from the first mortgagee.

ADMINISTRATION—TRUSTEE CARRYING ON TRUST BUSINESS—TORT OF TRUSTEE—DAMAGES—TRUSTEE, RIGHT OF, TO INDEMNITY—SUBROGATION.

In re Raybould, Raybould v. Turner (1900) 1 Ch. 199, discusses the right of a person who has recovered damages against a trustee for a tort involuntarily committed in carrying on a trust business, to have such damages paid out of the trust estate. The facts were that the trustee was carrying on his testator's colliery business for the benefit of the estate, and, in so doing, let down the surface of the land, and thereby injured the buildings on the adjoining land of a third party, for which the latter recovered a judgment for damages against the trustee. The plaintiff in that action now applied to be paid the amount of his judgment out of the testator's estate which was in course of administration. Byrne, J., held that he was entitled to be so paid, on the ground that the trustee himself had a right to indemnity out of the trust estate, the damages in question having arisen without any reckless or improper working of the mine on the trustee's part, and that the claimant should therefore be subrogated to the trustee's rights against the testator's estate.

HUSBAND AND WIFE—TORT OF MARRIED WOMAN—HUSBAND, LIABILITY OF, FOR TORT OF WIFE.

Earle v. Kingscote (1900) 1 Ch. 203, is probably not an authority in Ontario to its fullest extent, having regard to the provisions of R.S.O. c. 163, s. 17, but is nevertheless useful, as showing what is the common law liability of a husband for his wife's torts. In this case, the plaintiff sued both husband and wife for damages for fraud committed by the wife under the following circumstances: In July, 1898, the female defendant requested the plaintiff to join her in the purchase of some shares, and requested the plaintiff to raise £2,000 towards the purchase money. This the plaintiff did, and paid it to the female defendant on her representing to the plaintiff that the shares had been purchased. The plaintiff then applied for particulars of the shares, which the female defendant refused to give, and the action was then commenced against the female

defendant alone, and claiming a declaration that the shares were held in trust as to one moiety for the plaintiff, and for an injunction to restrain her dealing with them. In answer to the motion for an injunction, the female defendant filed an affidavit stating that the shares had never in fact been purchased, and the plaintiff thereupon joined the husband and claimed, in the alternative, damages against him for his wife's fraud. It was agreed that the question was to be settled by common law, and was not affected by the English Married Woman's Property Act, and the principal question discussed was whether or not the case was within the exception which at law exonerates both a wife and her husband from liability, where the tort complained of is one directly connected with a contract with the wife, and is the means of effecting it, and parcel of the same transaction. This exception arises from the fact that a married woman is not, nor is her husband, liable upon her contracts, and in order effectually to prevent her being made indirectly so liable, under colour of a wrong: *Byrne, J.*, who tried the action, came to the conclusion that the case was not within the exception, on the ground that the contract was complete before the fraud was committed, and the fraud was therefore not the means of effecting, or bringing about the contract, and he gave judgment against the husband for the amount claimed. In Ontario a husband's liability for his wife's tort is in any case (where the marriage has taken place on or after 1st July, 1884) limited to the property of the wife received by him, less any payments in respect of contracts or torts of the wife: see R.S.O. c. 163, s. 17; but as to marriages before that date the husband's liability continues as at common law, and it would be only in that class of cases that the present decision would be applicable.

STOCKBROKER — DEATH OF PRINCIPAL — CONTINUING ACCOUNT BY BROKER, AFTER PRINCIPAL'S DEATH.

In re Overweg, Haas v. Durant (1900) 1 Ch. 209, the facts were simple: The plaintiff was a stockbroker who had been employed by one Overweg, and had on 9th March, 1898, on Overweg's instructions, carried over for him, according to the rules of the Stock Exchange, a large number of shares, to be paid for on the 30th of that month. On 24th March, 1898, Overweg died, and the plaintiff was informed of the fact on the following day, and he then endeavoured to obtain instructions from Overweg's

representatives as to what was to be done with the stocks ; and not receiving any instructions, he, on 28th March, 1898, entered into fresh carrying over contracts for the stocks for the next settling day. On 29th April, in consequence of learning that Overweg's estate was insolvent, he at once sold the stocks at a loss, the result of the transactions being that he brought in Overweg in debt to him for £383 12s. 3d., for which he claimed to recover as a creditor against his estate. It was not denied that the plaintiff had acted as he thought best for the estate ; but it was held by Byrne, J., that by the death of Overweg the plaintiff's authority was revoked, and that the subsequent continuation of the account was unauthorized, and that, though Overweg's estate would have been liable for any loss sustained by a sale of the stocks in open market on the plaintiff becoming aware of his death, his estate was not liable for any loss arising on the new contracts subsequently entered into by the plaintiff, as such continuation is in law a sale and repurchase ; and as the personal representative elected to stand by the contract made on the 28th March, and repudiated the subsequent repurchase, the plaintiff could not recover, and his action was accordingly dismissed with costs.

MORTGAGE—"CLOG ON REDEMPTION"—TIED PUBLIC-HOUSE.

Rice v. Noakes (1900) 1 Ch. 213, is another case touching the effect of a contract by a mortgagee for a collateral advantage, in which the recent cases of *Biggs v. Hoddinott* (1898) 2 Ch. 307, and *Santley v. Wilde* (1899) 2 Ch. 474 (noted respectively ante, vol. 34, p. 773, and vol. 35, p. 486), are distinguished. In this case the mortgage was of a leasehold public-house, and contained a covenant binding the mortgagor to purchase all beer, &c., sold on the premises from the mortgagees. The mortgagor claimed to redeem the premises, and insisted on a reconveyance, together with a release of the covenant. The defendants objected to release the covenant ; but Cozens-Hardy, J., was clearly of opinion that the covenant, though valid during the continuance of the security, could not be maintained after all moneys secured by the mortgage had been paid, on the principle that, on redemption, the mortgagor is entitled to have all securities held by the mortgagee delivered up.

CONTRACT—ACCEPTANCE OF OFFER BY POST—WITHDRAWAL OF OFFER BEFORE ACCEPTANCE.

In re London & Northern Bank (1900) 1 Ch. 220, is upon the point, whether an offer to accept an allotment of shares had been validly withdrawn, before the posting of an acceptance of the offer. The question turned on the fact when the acceptance was posted. By the rules of the Post Office, postmen are not authorized to accept letters to be posted, and it appeared by the evidence that the letter of acceptance had been delivered to a postman to be posted about 7 a.m.; but the envelope containing it was impressed with a stamp indicating that it had been posted at a district post office, and from thence taken to the general post office, from which it was sent at 11.30 a.m. The letter of withdrawal was received at about 9.30 a.m. On the evidence Cozens-Hardy, J., came to the conclusion that as the letter of acceptance had been improperly delivered to a postman, who was not the agent of the Post Office for that purpose, the plaintiff had failed to show that it had properly reached the Post Office before the receipt of the letter of withdrawal, and, therefore, that the latter was valid.

ADMINISTRATION—TRUST DEED—TRUSTEE, MISCONDUCT OF—ACCOUNT AGAINST TRUSTEE, WHEN REFUSED—RULE 772—(ONT. RULE 954).

In *Campbell v. Gillespie* (1900) 1 Ch. 225, the Court, in the exercise of its discretion under Rule 772, (see Ont. Rule 954), refused a general account against a trustee. The facts were as follows: In 1887 one Campbell, an insolvent trader, assigned his business to the defendant for the benefit of his creditors, with an ultimate trust for himself. In 1893 Campbell assigned his interest under the deed to his wife, the plaintiff, for her separate use. In 1896 the defendant re-assigned the business to the plaintiff. On this occasion some investigation of the trust account was made by the plaintiff, but no detailed account was required by, or rendered to her. In 1898 the defendant destroyed all the books of account connected with the trust under the honest belief that they were no longer required. In October, 1898, after the books had been destroyed, the present action was commenced against the defendant, who was charged therein with fraud and misconduct, and an account was claimed against him from 1887 to 1896 on the footing of wilful neglect and default. The defendant denied the charges of fraud and misconduct, but admitted three specific items

in respect of which he was chargeable. At the trial the charges of fraud and misconduct were not established; and under these circumstances Cozen-Hardy, J., considered that relief should be given only in respect of the three specific items admitted, and that the general account from the beginning of the trust should be refused.

VENDOR AND PURCHASER—CONDITIONS OF SALE—OUTGOINGS.

Barsht v. Tagg (1900) 1 Ch. 231, was an action by a purchaser for specific performance of a contract for the sale of lands, and the sole question was one as to the liability for certain outgoings which had arisen after the date fixed for completion. The contract was made in July, 1898, the time fixed for completion being 11th August, 1898. The conditions of sale provided that, in case of delay in completion from any cause, the vendor should have the option of receiving either interest on the purchase money, or the rents and profits up to the date of actual completion. Owing to the plaintiff's fault, he was not ready to complete until February, 1899. In November, 1898, the defendant had paid certain outgoings for the abatement of a nuisance on the premises, and he elected to retain the rents and profits. The plaintiff contended that, inasmuch as he elected to retain the rents and profits, he was also thereout bound to discharge the outgoings in question, whereas the defendant refused to complete, except on the terms of the plaintiff paying his purchase money, and the amount of the outgoings so paid by the defendant. Cozens-Hardy, J., held that under the conditions of sale the defendant's option to retain the rents and profits in lieu of interest did not involve any liability on his part to assume the payment of the outgoings which, *prima facie*, the plaintiff was bound to pay.

WILL—ABSOLUTE GIFT—JOINT TENANTS—SECRET TRUST COMMUNICATED TO ONE OF TWO JOINT TENANTS—NOTICE.

In re Stead, Witham v. Andrew (1900) 1 Ch. 237, is a case which turns on the effect of a secret trust in respect of property bequeathed to two persons as joint tenants, but which trust was communicated to one of them only, the other having no notice thereof. Farwell, J., held that under the circumstances of this case the trust was binding only on the legatee to whom it was communicated, and not on the other, who was entitled to take the

bequest beneficially for her own use. He points out that the cases have established a distinction between those cases where the will is made on the faith of an antecedent promise by one of the joint tenants that he will carry out the wishes of the testator, and those cases in which a will is left unrevoked on the faith of a subsequent promise by one of the joint tenants to execute a secret trust. In the former case the trust binds both joint tenants. In the latter case, only the legatee who is apprised of the trust is bound. He held the present case to come within the second class, because the plaintiff had failed to establish that the will had been made on the faith of the plaintiff executing the alleged trust.

SETTLEMENT — VOLUNTARY, BY LADY JUST OF AGE — FIDUCIARY RELATIONSHIP—INDEPENDENT ADVICE—SOLICITOR, DUTY OF—POWER OF REVOCATION—COSTS.

Powell v. Powell (1900) 1 Ch. 243, was an action brought to set aside a voluntary settlement made by the plaintiff, a young lady, who had just attained twenty-one, in favour of her half-brother and sister, and her former guardian. On her coming of age, the defendant, who had been the plaintiff's guardian, presented her with a memorandum, signed by her deceased father, in which he expressed the wish that she should make a statement of her property so as to give her half-brother and sister an equal share, and the plaintiff, in order to give effect to her late father's wishes, was persuaded to execute the settlement in question, which contained no power of revocation, under which she took one-third of the income of the settled fund during the joint lives of herself and the defendant (her former guardian), and the latter the other two-thirds, with alternate limitations of the capital on the death of the defendant (the former guardian) amongst the plaintiff and her half-brother and sister in equal shares. The same solicitor acted for both parties, and he was made a party to the action. Farwell, J., was of the opinion that the settlement could not be supported, as the plaintiff had been induced to make it without independent advice, and on the solicitation of her former guardian, between whom and herself a judiciary relationship had so recently existed. He was also of opinion that a solicitor called upon to advise in such a case cannot properly act for both parties, and that it is his duty to protect the donor as far as possible against himself, and not merely against the personal influence of the

donee, and he does not discharge his duty by simply ascertaining that the donor understands, and wishes to carry out, the transaction. He must also satisfy himself that the gift is one that it is right and proper for the donor to make, under all the circumstances, and if he is not so satisfied, he should advise his client not to go on with the transaction, and ought not, if he disapproves of it, to assist in carrying it out merely because, if he did not act, some one else might be found who would ; and that such gifts should not in any case be made by young persons just come of age without a power of revocation being inserted in the instrument. Because the solicitor had failed in his duty in this respect he was refused his costs.

PRACTICE—NON-SUIT—DISCONTINUANCE—RULES 290-293—(ONT. RULES 430, 431, 543, 1198 (D)).

In *Fox v. The Star* (1900) A.C. 19 the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, Morris, and Shand,) have affirmed the decision of the Court of Appeal (1898) 1 Q.B. 636 (noted ante, vol. 34, p. 404), to the effect, that a plaintiff cannot now elect to be non-suited ; and if he offers no evidence at the trial the defendant is entitled to a verdict and judgment dismissing the action. It is thus settled pretty conclusively that the old common law practice which enabled a plaintiff to accept a non-suit at his election, and bring another action for the same cause is no longer in force.

BY-LAW—WORK EXECUTED IN CONTRAVENTION OF—CONTINUING OFFENCE—BUILDER, LIABILITY OF.

In *Welsh v. West Ham* (1900) 1 Q.B. 324, a builder, who had erected for another person a building in contravention of a municipal by-law, was convicted of an offence against the by-law and fined. He was subsequently prosecuted and convicted for a "continuing offence" against the by-law under a statute which provided that, where the execution of a work is an offence in respect whereof the offender is liable, under any by-law, to a penalty, the existence of the work in such form and state as to be in contravention of the by-law shall be deemed to be a continuing offence. It appeared that the builder had no power to go upon the premises, or to remedy the breach complained of. Under these circumstances the Divisional Court (Darling and Channell, JJ.), on appeal from the conviction, held that the builder was not guilty of a "continuing offence" within the meaning of the statute.

The Forum.

A CAUSERIE OF THE LAW.

CONDUCTED BY CHARLES MORSE.

Those who read Mr. G. C. Speranza's article on the "Decline of Criminal Jurisprudence in America," in the *Popular Science Monthly* for February, no doubt found in it a good deal of food for reflection. What he says of the attitude of the profession in the United States towards criminal business is equally true of Canada. Beyond a doubt to-day, the young Canadian lawyer who stands upon the threshold of practice feels that he must eschew the criminal courts if he would attain the good reputation that must be his who ultimately holds the highest rewards of his profession. Consequently, the practice of the most important branch of the law from the view-point of ethics and sociology—a branch of the law wherein hitherto many of the giants of the English Bar have made their paramount fame—is nowadays, in this country, relegated to the shysters and "brilliant-failure" men, with a few notable exceptions which only serve to emphasize the general correctness of our statement. There exists, then, a crying need for reform. But where shall it begin? Mr. Speranza seems to be of the opinion that the initial step might be taken by the law-schools in the direction of a radical scientific reinforcement of their curricula touching the subject; but, while this would undoubtedly be helpful, we think a more thorough amelioration might be achieved if the Legislature would do a prompt something towards bringing the criminal law itself into touch with the scientific advancement of the times, and so make it a province in which only the thoroughly equipped specialist might find emolument and renown. It seems to us that then, and not till then, will the odium populi concerning the criminal lawyer become effaced, and the lawyer who is a 'criminologist' win the respect of an enlightened community.

* * * We know it is the fashion for politicians to minimize the ability of Parliament to make men good citizens; they say its part is only to make it disadvantageous for us to be bad citizens. That is their philosophy of the criminal law; and the pity of it is not so much that it is stupid and ignorant, but that so many wise and

enlightened men hold to it. It is an illustration of the truth demonstrated by experience, that—

“ Full often bends
Current opinion in the false direction,
And then the feelings bind the intellect.”

Beccaria long ago taught that the criminal law ought to look to the prevention of crime rather than to its punishment; and prevention means more than making the severity of the law's sanctions a deterrent from crime. It means that an incipient bias to wrongdoing should not, by committal of juveniles to places of promiscuous imprisonment, be hopelessly solidified into the criminaloid mental state. It also means that every accused person shall have the benefit of intelligent discernment between his liability to punishment for a conscious infraction of the law, and his need of proper treatment for mental disease demonstrated by his method of committing the crime, and his abnormal motive, or lack of motive, therefor. It means, in short, a considerable departure from the methods which Herbert Spencer stigmatizes as not only failing to reclaim the malefactor, but which, in many instances, have increased criminality. We seem to have forgotten that education plays a large part in the reformation of the criminal.

* * * But the superficial reformer points to the excellences of our criminal code as compared with the state of the law at the beginning of the century, and airily bids us to fret not at the Law's unavoidable delay, but be thankful for our present great advancement in dealing with the repression of crime. Undoubtedly we have progressed, but that is no reason why we should rest on our oars when so much remains to be done.

* * * Besides this general arraignment of the philosophy of our criminal law, we might present some specific instances wherein we conceive the system to be defective, did space permit. We must content ourselves with the mention of one only at this time. The test of criminal responsibility which our courts are bound to apply is that formulated by the judges in *McNaghten's Case*, 10 Cl. & F. 200, which may be stated thus: the ability of the accused to distinguish right from wrong at the time of the offence. The judges practically say that it being once established that the prisoner's mental disease did not prevent him from knowing that what he was doing was wrong, then all evidence of insanity tending

to destroy his freedom of will does not displace his criminal responsibility. Now, alienists to-day wholly repudiate such a criterion, and say the proper enquiry is, "whether, in consequence of congenital defect or acquired disease, the power of self-control is absent altogether, or is so far wanting as to render the individual irresponsible. As has again and again been shown, the unconsciousness of right and wrong is one thing, and the powerlessness, through cerebral defect or disease, to do right, is another. To confound them in an asylum would have the effect of transferring a considerable number of the inmates thence to the treadmill or the gallows" (Bucknill & Tuke's *Psychological Medicine*, 4th ed., p. 269). A writer in 12 Criminal Law Magazine, at p. 4, says: "The rule in *McNaghten's Case* is attacked because it holds a partially insane person as responsible as if he were entirely sane, and it ignores the possibility of crime being committed under the duress of an insane delusion operating on a human mind, the integrity of which is destroyed or impaired by disease, except, perhaps, in cases where the imaginary state of facts, if real, would excuse or justify the act done under their influence." We venture to think that a purely artificial test established over fifty years ago should be revised in the light of modern scientific research.

* * * Of course we are aware that this medico-legal dogma, while having been adopted as law in some States of the American Union, has elsewhere been violently oppugned as tending to facilitate pseudo-defences to indictments for crime, and, consequently, to promote escape from legal punishment. But we think that with the exactness of diagnosis now possible to the phsyopathist, the chances of successful deception on the part of the accused are extremely small; and again, no advocate of the scientific test of criminal responsibility suggests that any involuntary malefactor should be allowed to roam the community at large while there are insane asylums humanely open for his reception. Many 'mental irresponsibles' have been murdered by stare decisis in the past; let us assure ourselves, then, that we might properly take some risk on the side of greater humanity for the future.

* * * The initial volume of Dr. T. A. Walker's new "History of the Law of Nations" is not an unqualified success, if it is fairly treated by some of the critics. The most notable thing that one of the 'criticizing elves' finds in the book is a *mot* attributed to

Lord Salisbury, namely: "International Law has not any existence in the sense in which the term law is usually understood. *It depends generally upon the prejudices of writers of text-books.*" We have not yet been favoured with an opportunity to peruse the volume, and so cannot speak of its real merits.

* * * Another celebrated man of letters who had been bred to the Bar in his youth passed away in February last. Henry Duff Trail, D.C.L., was undoubtedly one of the foremost litterateurs of his time. Besides his volumes on Sterne and Coleridge in the "English Men of Letters" series, he contributed "Shaftesbury" to the "English Worthies" series; "William III." to the "Twelve English Statesmen;" "Strafford" to "English Men of Action," and an estimate of Lord Salisbury to the "Queen's Prime Ministers" series. Other works from his industrious pen are "The New Lucian" and a "Life of Sir John Franklyn." He also edited the valuable collection of sociological essays published under the name of "Social England." Besides this, he did a great deal of journalistic work, and was the editor of "Literature" up to the time of his death. What a splendid content for a span of life of fifty-seven years!

* * * It is the abounding nescience of such literary personages as Mr. Robert Buchanan that disgusts hard-headed lawyers with contemporary belles-lettres. In his "Ethics of Criticism" (which, by the way, is mainly a jealous fling at Rudyard Kipling) in the February number of the Contemporary Review, Mr. Buchanan is not content to successfully wear the *bonnet d'âne* in remote and innocuous fields, but he must needs, in an acute stage of his excitement, commit a contempt against the dignity of the law. Listen to his screed: "Literature, although itself only a small part of Life, is a much broader and larger part of Life than either Medicine, the Bar or Art * * * The pursuit of Medicine is very indirectly concerned with the question of Ethics, while the profession of the Law is to a large extent absolutely opposed to the highest Ethical sanctions." Now, while we are pleased with the assurance that Life has more of Literature than Medicine in it, we would respectfully inform the perfervid Mr. Buchanan that when he affirms, with a bravery of capital letters, that "Law is to a large extent absolutely opposed to the highest Ethical sanctions," he is simply talking capital Rot. If our critic knew howsoever

little of Jurisprudence, he would know that positive law is avowedly based on the law of nature. But we will not send him to the law-books. We will refer him to 'pure Literature,' and bid him read in Cicero: "Lex nihil aliud nisi recta et a numine deorum tracta ratio, jubens honesta, prohibens contraria;" or, in the modern pages of Froude: "Our human laws are but copies, more or less imperfect, of the eternal laws, so far as we can read them,"—and thus learn the folly of his declaration so presumptuously made. Mr. Buchanan should not think so ill of the Law; it affords him present protection in the exploitation of his vagaries, and an ultimate harbour of refuge when his strenuous battling with 'chimeras dire' proves too much for even his Homeric nerves.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

EXCHEQUER COURT.

Burbidge, J.]

DAVIES *v.* THE QUEEN.

[March 2.

Highway—Agreement between Crown and city to maintain same—Negligence—Accident from ice—Liability—Public work—50 & 51 Vict., c. 16, s. 16 (c).

Under an agreement between the City of Ottawa and the Dominion Government, the latter undertook, amongst other things, to maintain an approach to the Sappers' Bridge, such approach having been built by the city and forming part of a public highway. On the 23rd February, 1898, the sidewalk on the said approach was in a slippery condition, and the suppliant in passing over it fell and sustained a fracture of one of her arms. She filed a petition of right seeking damages against the Crown under 50 & 51 Vict., c. 16, s. 16 (c).

Held, that, even assuming that the sidewalk upon which the suppliant fell was a public work, it not having been established that the duty to keep the sidewalk in repair, or in a safe condition for travel, had been imposed upon some officer or servant of the Crown, who had been negligent while acting within the scope of some duty or employment, the case did not fall within the said enactment, and the petition must be dismissed.

2. In this climate, it is not possible always in winter to have the sidewalks of the highways always in a safe condition to walk upon; and

negligence in that respect when it is actionable consists in allowing them to remain an unreasonable time in an unsafe condition.

A. E. Fripp, for suppliant. *E. L. Newcombe*, Q.C., for respondent.

Province of Ontario.

COURT OF APPEAL.

Moss, J. A.]

[March 30.

WINDSOR FAIR GROUNDS, &C., ASSOCIATION *v.* HIGHLAND PARK CLUB.

Parties—Third party notice—Agreement—Rule 209—Appearance—Leave to appeal.

Leave to appeal from an order of a Divisional Court, ante 165, setting aside a third party notice, was refused by a judge of the Court of Appeal in Chambers.

Held, that the Divisional Court had not placed a construction of general application upon the words "or any other relief over" in Rule 209, but had merely decided their bearing upon the facts of this case, which were of a nature not likely to be of common occurrence; there was nothing special in the case beyond the fact that a Divisional Court of three judges had differed from the view of another judge of the High Court and of a local judge; and the amount involved was comparatively small.

Moreover, the decision of the Divisional Court did not deprive the defendants of the benefit of the alleged dealings with the proposed third parties as a defence to the plaintiffs' action, and if the defence should be successful there would be no occasion for seeking relief over.

Seemle, that even if leave to appeal were granted, it would not be on technical grounds, but only on the construction of the rule.

F. A. Anglin, for defendants. *Aylesworth*, Q.C., for proposed third parties.

HIGH COURT OF JUSTICE.

Divisional Court.]

REEKIE *v.* McNEIL.

[Dec. 18, 1899.

County Courts—Appeal—Inability of courts to extend time limited—Striking out appeal.

The provisions of ss. 55 and 56 of the County Courts Act, limiting the time in which an appeal from the County Court to the Divisional Court must be set down is peremptory and there is no power to dispense with such provisions, or to enlarge the time for setting down the appeal.

Where therefore a judge of a District Court refused to certify the pleadings so as to enable an application set down for the Divisional Court and an order was obtained from a judge to allow such an appeal to be set down, such order was held to be of no avail, and the appeal was struck out.

R. U. Macpherson, for the motion. *Hugh Rose*, contra.

Boyd, C.] BOARDMAN *v.* NORTH WATERLOO INS. CO. [Dec. 28, 1899.

Insurance—Condition—Change material to risk—Non-occupancy.

Whereby a condition in a fire policy on a dwelling house, any change material to risk, etc., should avoid the policy, the fact of the premises being unoccupied and vacant did not constitute a breach of such condition.

Maybee, for plaintiff. *E. F. B. Johnston*, Q.C., and *Reade*, for defendants.

Royd, C.] SPAHR *v.* NORTH WATERLOO INS. CO. [Dec. 28, 1899.

Insurance—Statutory conditions—Condition requiring occupation of premises—Untenanted—Meaning of.

The conditions in a policy of fire insurance provided that "If the premises insured became untenanted or vacant and so remained for more than ten days without notifying the company," etc., "the policy will be void," is a reasonable condition, and the word "untenanted" therein must be read as synonymous with "unoccupied."

Where therefore the occupant of a house left it for several weeks, but left furniture and clothing therein, while a person went there to feed the pigs and chickens and water the flowers, and on two occasions the insured's husband slept in the house, it was held that the house was untenanted and vacant within the meaning of the condition.

Maybee, Q.C., for plaintiff. *E. F. B. Johnston*, Q.C., and *Reade*, for defendants.

Divisional Court.] NORTHEY MFG. CO. *v.* SANDERS. [Dec. 28, 1899.

Sale of goods—Specific article—Warranty—Parol evidence.

Under a written contract for the sale by description of a specific article, namely a gasoline engine with a pump standard, it not being pretended that it did not answer such description, such contract must be taken to cover, as it purported to do, the whole contract between the parties, and parol evidence is not admissible to show a warranty made prior to the entering into of the contract which is inconsistent with the written warranty as it would be allowing the admission of parol evidence to control, vary, add to or subtract from the written contract; and the statements alleged to have

been made by the vendors, and acted on by the purchaser, were not such as to constitute a separate and independent collateral agreement, and admissible as such.

J. R. Roaf, for plaintiffs. *Mills*, for defendant.

Divisional Court.]

[Dec. 29, 1899.

REGINA EX REL. HORAN *v.* EVANS.

Public Schools—Trustee—Residence.

The defendant, a life tenant of a farm in the township of Albion, lived on it from 1888 until 1894, when he rented it to his son and went to live with his wife and family on a farm owned by his wife, in the township of Caledon, where he continued to live until 1898, when the son having given up possession of the Albion farm, he took possession of it, to enable him to work it, sleeping in the house, and occasionally visiting his wife and family and remaining there over night, while the wife occasionally visited him, staying a couple of weeks, when there was cooking or mending to be done.

Held, that the defendant's place of residence was where his wife and family lived, and he was therefore not a resident within the township of Albion so as to qualify him as a trustee of a school section within that township, to which he had been elected; but as the granting of the order for a quo warranto, was in the discretion of the court and the term of the defendant's office would expire before the issue could be tried, the motion was dismissed, but without costs.

Sub sec. 8 of s. 4 of the R.S.O. c. 292, would not of itself prevent the granting of such order.

T. J. Blain, for the relator. *Morphy*, contra.

Ferguson, J.] HAMILTON *v.* NORTHEY MFG. CO. [Dec. '30, 1899.

Sale of goods—Engine—Warranty for return of article.

Where, in a contract for the sale of a gasoline engine and tank, there was a warranty that if the engine would not work well, notice thereof was to be given to the defendants stating wherein it failed, and giving a reasonable time to get to it and remedy the defect, and, if such defect could not be remedied, the engine was to be returned to the defendant, and a new engine given in its place.

Held, that the plaintiff's remedy under such warranty was for the return of the engine and its replacement by another engine, and not for damages for breach of warranty.

A. S. Bull and *S. G. McKay*, for plaintiff. *J. R. Roaf*, for defendants.

Meredith, C.J.]

McCORMICK v. COCKBURN.

[Jan. 6.

Mortgage—Fraud of solicitor—Liability.

The plaintiff, for the purpose of raising a portion of the purchase money on a contemplated purchase of land, mortgaged lands then owned by him to the defendant C., the money being received by a solicitor who acted for both parties. The purchase not having been carried out, the plaintiff asked to have the mortgage discharged, whereupon the solicitor, who had misappropriated the moneys, fraudulently procured from the mortgagee an assignment of the mortgage to himself, which he assigned to the defendant P., who advanced the money thereon in good faith and without any knowledge of the fraud.

Held, that the plaintiff was entitled to a reconveyance of the property released from the mortgage, and that the loss must be sustained by the defendant P., who took nothing under the assignment to him, for, the mortgage being paid off, the solicitor acquired no beneficial interest, being at most but a trustee of the legal estate, and he could pass no higher or better title to his assignee.

Staunton, Q.C., for plaintiff. W. H. Blake, and Crerar, for defendants.

Divisional Court.]

ROYAL VICTORIA v. RICHARDS.

[Jan. 10.

Insurance—Premium payable on presentation of policy—Non-acceptance of policy—Damages.

By an application for a policy of insurance on the defendant's life, he bound himself to pay the first premium on the presentation of the policy; but it was also agreed that the company should not incur any liability until the premium had been actually paid and received by the company. The application was accepted by the company, and a policy issued and tendered to the applicant, who refused to accept the same.

Held, that the company could not claim the whole amount of the premium as liquidated damages, but were entitled to such damages only as had been occasioned by the defendant's refusal to accept the policy.

W. R. Riddell, Q.C., for the Company. No one contra.

Rose, J.]

POTTS v. POTTS.

[Jan. 11.

Insurance—Benefit society—Beneficiary for value—Right in policy.

Under ss. 151 and 160 of the Ontario Insurance Act, R.S.O. c. 203, it is not necessary in the absence of a requirement therefor on the face of the policy to find as a fact whether or not the beneficiary is one for value; but apart from this the evidence showed that the plaintiff, who claimed to be a beneficiary under such a policy, had no claim whatever thereunder.

Waldrum and Mulbery, for plaintiff. Teetzel, Q.C., and McClements, for defendants.

Divisional Court.]

REGINA v. MCGARRY.

[Jan. 15.

Intoxicating liquors—Former conviction—Proof of, by parol.

Under sub-secs. 1 and 2 s. 101 of the Liquor License Act, R.S.O. c. 245, it is not necessary that the proof of the prior conviction should be by the production of the formal conviction or by a certificate thereof, other satisfactory evidence being by the statute declared to be sufficient. Where, therefore, on a trial before a magistrate, being the same magistrate by whom the defendant had been previously convicted of a like offence, the information alleging such prior conviction, and all that appeared with regard to it was the evidence of the license inspector who proved that the defendant was the person previously convicted. It must be assumed that the magistrate satisfied himself as to the prior conviction, the inspector's evidence only being necessary to prove the identity of the defendant.

J. M. Godfrey, for defendant. *Langton*, Q.C., contra.

Divisional Court.]

MEEK v. PARSONS.

[Jan. 22.

Free Grant and Homestead Act—Sale of land to take effect after patent—Validity of.

Sec. 19 of the Free Grant and Homestead Act, R.S.O. c. 29, which provides that "neither the locatee, nor anyone claiming under him, shall have power to alienate (otherwise than by devise) or to mortgage or pledge any land located as aforesaid, or any right or interest therein before the issue of the patent," does not prevent an agreement being entered into before the issue of a patent for the grant of land after the issue thereof and where such agreement was entered into it was enforced after the issue of the patent and where all the requisites of s. 8 of the Act had been complied with.

Judgment of MACMAHON J., reversed. FALCONBRIDGE, J., dissented.

Aylesworth, Q.C., for plaintiff. *D. E. Thomson*, Q.C., and *Slaght*, for defendant.

Divisional Court.]

MORSON v. BURNSIDE.

[Jan. 30.

Sale of land—Land agent—Commission.

The defendant, knowing that the plaintiff was a land agent, arranged with the plaintiff to procure for him a purchaser for a lot of land of his at a named price. Through the plaintiff's intervention a proposed purchaser was procured and a purchase discussed, the result however was that a lease was entered into of the premises for three years with a collateral agreement giving him the option of purchasing within a year, which he exercises, and purchased the property.

Held, that the plaintiff was entitled to his commission.

Herbert Mowat, for the plaintiff. *R. J. Gibson*, contra.

Divisional Court.]

MACGREGOR v. SULLY.

[Jan. 30.]

Apprentice — Articles of apprenticeship — Unreasonable provision — Non-liability.

Articles of apprenticeship which required the apprentice during the term of four years of 310 working days of ten hours each to give and devote to a firm, to whom he was apprenticed, ten hours each working day, or such number of hours as might be the regulation of the workshop for the time being, or as special exigencies of the business might require is unreasonable and could not be enforced against the infant; and therefore an action was not maintainable against the defendant, who was security under the articles for the performance of the infant's duties, to recover damages for the breach thereof.

W. R. Riddell, Q.C., for defendant. *Shepley*, Q.C., for plaintiff.

Divisional Court.]

GARDNER v. CANADA MNFG. & PUBLISHING CO.

[Jan. 31.]

Directors—Invalid resolution—Payment of creditors.

By the by-laws of a publishing company the board of directors was to consist of three persons, two of whom constituted a quorum. At a meeting, at which two of the directors, C. and G. were present, one being the president and the other the secretary of the company, a resolution was passed that "The matter of the compensation of 'C.' the editor, and 'G.' the advertising solicitor of the company was considered, and the sum of \$1,000 each, ordered to be placed to their respective credits in the books of the company for services rendered during the year 1895, in addition to their regular salary, and to be charged to their salary account." 'C.' as a matter of fact had not been appointed editor nor 'G.' advertising solicitor, the object of the resolution being to appropriate all the funds of the company, and to prevent a stock holder, who owned the greater part of the stock, and had made a claim against the company, being paid.

Held, that the resolution could not be sustained, nor could any moneys received under it be retained.

Shepley, Q.C., for the appellants. *Barwick*, contra.

Divisional Court.]

REGINA v. TORONTO PUBLIC SCHOOL BOARD.

[Feb. 2.]

Public Schools—General Sessions of the Peace—Appeal from order of dismissal of—Divisional Court—Offence under by-law—Municipal Act, R.S.O. c. 223, s. 551.

There is no appeal to the Court of General Sessions of the Peace from an order of dismissal of a complaint against a city by-law passed under the authority of above statute.

F. E. Hodgins, for the appellants. *J. E. Jones*, contra.

Divisional Court.]

WHITELOCK v. COOK.

[Feb. 8.

Landlord and tenant—Removal of goods before rent due—Illegal distress—Pretended sale by tenant—Right of tenant to set up title to goods—Counterclaim—New trial.

A landlord is not justified in distraining goods which had been removed off the demised premises before the rent accrued due, though had the rent been due the removal would have been fraudulent; and the tenant is not precluded from setting up his title to the goods because of a pretended sale of them, the effect of which was to vest the possession but not the property in the goods in the alleged purchaser.

To the action for the illegal distress in the County Court the defendant counterclaimed for rent due, but such counterclaim not having been tried, the action was remitted back to the County Court to be there dealt with, regard to be had to the finding of the Court as to the rights of the parties.

Bicknell, for plaintiff. *D. E. Thomson*, Q.C., for defendant.

Armour, C. J., Falconbridge, J., Street, J.]

[March 8.

BROCKBANK v. HOLMES.

Mortgage—Authority of solicitor for mortgagee to receive mortgage money—Execution—Alteration—Evidence—Presumption.

One of the defendants, a widow, agreed to purchase land, and employed a solicitor to act for her in the matter of the purchase. The property was subject to a mortgage for \$3,500, which the mortgagee required should be paid, and the solicitor arranged with P. to advance \$2,500 of the amount, with the plaintiff to advance \$500 upon the interest of the defendants in other lands, and he himself promised to advance the remainder of the sum required, the widow having also a little money of her own. A mortgage from the widow to P. for \$2,500 was accordingly executed; also a mortgage from the defendants to the plaintiff for \$500; and a mortgage from the widow to the solicitor for \$300. All these mortgages and a conveyance from the vendor to the widow were registered by the solicitor, who had previously received from the plaintiff \$400 of the amount the plaintiff had agreed to advance, giving a receipt for the amount "for investment *Jemima and Christiana Holmes mortgage*," and making the affidavit of execution of the mortgage. Shortly afterwards the plaintiff gave the solicitor \$90 further of the amount he was advancing, and the solicitor gave him credit for \$10 which he owed to the plaintiff. From the time of the completion of the documents the defendants never made any further inquiry as to the matter, and only went to the solicitor to pay him his account for his services and to ask him for the mortgage deed for the \$3,500, which they assumed he had paid, and supposed he would have, but

which he told them was held by P. as one of the title deeds. As a matter of fact the solicitor appropriated the \$490 to his own use and never paid it to the original mortgagee.

In an action upon the \$500 mortgage the defendants denied the making of it, and denied that any money was ever advanced by the plaintiff to them upon it.

Held, affirming the findings of MEREDITH, C.J., the trial judge, that the solicitor had the authority of the defendants to receive from the plaintiff the mortgage money on their behalf for the purpose of applying it in part payment of the \$3,500 mortgage.

Held, also, ARMOUR, C.J., dubitante, that the proper conclusion from the evidence was that the plaintiff's name was written in the mortgage at the time of its execution. The instrument on its face bore every indication that the name of the plaintiff was written at the same time as the names of the defendants and the other written portions of it. The positive evidence of the witness who drew it supported the appearance of the document itself, and there was also a presumption, rebuttable of course, in favour of its regularity. The recollection of the solicitor, who was the subscribing witness, was the other way, but he was not positive upon the point. The surrounding circumstances were as consistent with one conclusion as the other, and the benefit of any doubt should be given in favour of the validity rather than of the invalidity of an instrument such as this, regular upon its face, intended by the defendants to be acted upon, acted upon as they intended, and strongly supported.

Holman, Q.C., for the defendants. *S. C. Smoke*, for the plaintiff.

Boyd, C.] YOUNG v. DOMINION CONSTRUCTION CO. [March 28

*Writ of summons—Substituted service—Foreign corporation—
Rules 146, 167.*

Service of process must be, if possible, personal, or, in the case of a corporation, upon the duly constituted agent; the substitutional action is to be followed only when prompt personal service appears by affidavit to be unavailable.

Rule 146 regulates substituted service of process. Rule 167 covers miscellaneous proceedings in the progress of litigation, but is not to be used so as to nullify the special Rule applicable to writs of summons.

And where the plaintiff showed that he knew where the head office of the defendants, a foreign corporation, was, and that they had no office or definite place of business within Ontario, and there was nothing to show that they could not be easily served at the head office, an order for substituted service was vacated.

A. M. Lewis, for plaintiff. *D'Arcy Tate*, for defendants.

Province of Nova Scotia.

SUPREME COURT.

Meagher, J., at Chambers.]

[March 20.

OVERMAN WHEEL CO. v. FORBES MFG. CO.

Company—Judgment creditor's right to execution against shareholder of debtor company for unpaid calls—His right of set-off.

The plaintiff company recovered judgment against the defendant company on which execution was issued and returned unsatisfied. The plaintiff company then applied for leave to issue execution against one John Peters, a shareholder of the defendant company for the amount of the unpaid calls on his stock in the company. Peters resisted the application on the ground that he had a set-off against defendant company for a larger amount.

MEAGHER, J.: The defendant's position and the rights of the plaintiffs are well stated by Cockburn, C.J., in *Wyatt v. Derwent Valley Railway Company*, 2 C.B.N.S. 110, where during the argument he said: "The judgment creditor has a right to have execution against the shareholder to the extent of his share not paid up. What answer is it for the shareholder to say: The company is indebted to me as well as to you? The one party has a judgment against the company, the other a mere right of set-off." See also *Thompson on Stockholders*, s. 381. The case of *Ings v. Bank of P.E.I.*, 11 Sup. C.R. 265, has no application. That was merely an action to recover a debt, and the right to set-off was clear in that case. There was no judgment as here. If Mr. Peters is sued by the company to-morrow for a debt, I take it he would be entitled to set-off the amount he claims to be due him. The plaintiff's application must prevail.

J. A. Chisholm, for plaintiff. *H. Mellish*, for Peters.

Province of New Brunswick.

SUPREME COURT.

Barker, J., in Equity.]

CUSHING v. McLEOD.

[Jan. 12.

Charter party—Customary despatch—Lay days—Notice of vessel being at berth—Sufficiency—Delivery of cargo—Delay.

By charter party the defendant's ship was to proceed to the port of St. John for lumber for Buenos Ayres, to haul once to loading berth as

might be required by charterer, with privilege to charterer of moving vessel afterwards at own expense. It was provided that cargo was to be furnished at customary despatch; that lay days should commence from the time the vessel was ready to receive cargo and written notice thereof given to the charterer, and that for each day's detention by charterer's default he should forfeit \$60 per day to the owner of ship. On arrival of the vessel on the 23rd of August the master was notified by the charterer to proceed to loading berth about 100 yards from where vessel was then lying. On the 28th of August the master mailed a notice to charterer that the vessel was then at loading berth and ready to receive cargo on the 29th. At time notice was sent, the vessel was not at loading berth.

Held, that the vessel should have been at her loading berth ready to receive cargo at the time notice was sent, that the notice was therefore insufficient, and lay days did not commence to run previous to commencement to deliver cargo.

The words "customary despatch" in the above charter have not a recognized meaning at the port of St. John with reference to the loading of lumber for shipment to South American ports. Their meaning must be taken to be that the vessel shall be loaded with the usual despatch of persons engaged in the trade having a cargo ready for loading. Upon the evidence, the Court found the rate to be 35 M. per weather-working day; substantial work, though not amounting to half a day, to count as half a day.

Cargo delivered under the above charter was brought to the loading berth over the Intercolonial Railway, and delivery was delayed by the railway. It was contended by the charterer that, as he had a right to name the load berth, any delay arising from delivery by railway was to be borne by the vessel.

Held, that as the charterer was bound to deliver cargo at the customary despatch of persons having a cargo at the place of loading ready for shipment, delay must be borne by charterer.

W. Pugsley, Q.C., and A. P. Barnhill, for plaintiff. *A. A. Stockton, Q.C., and C. J. Coster*, for defendant.

En Banc.]

DIBBLEE v. FRY.

[Feb. 9.

Action on limit bond—Striking out pleas—Supreme Court Act, s. 133.

In an action on a limit bond taken in a suit in the City Court of St. John defendants pleaded that said Court did not have jurisdiction, and in said plea set out at length the proceedings in said Court, showing the issue and service on Nov. 16 of a summons returnable on Nov. 17, and that on Nov. 25, without the service of any other process, plaintiff recovered a

judgment against the principal defendant. The magistrate's record, which was set out in said plea, contained this entry ; "Thursday, the 24th Nov., having been appointed Thanksgiving Day, was a public holiday, in consequence of which the Court is held on Friday of this week ;" and defendant's contention was that Thanksgiving Day, the day for which the cause stood for trial, not being a dies non or legal holiday within the meaning of 52 Vict., c. 27, s. 54, the Court lost jurisdiction over the cause by not taking it up on that day. JUDGE McLEOD, on application of plaintiff, struck out the plea under s. 133 of the Supreme Court Act. The above section 54 provides that the City Court shall be held on Thursday in every week, provided that when Christmas Day, or New Year's Day, or any other legal holiday shall fall upon Thursday, the said Court shall be held on the Friday in such week."

Held, on motion to rescind JUDGE McLEOD's order, that the plea was not embarrassing within the meaning of said section, plaintiff's remedy, if the plea were bad, being to demur to it. Order rescinded.

A. A. Wilson, Q.C., for plaintiff. *W. B. Wallace*, Q.C., for defendants.

Barker, J., in Equity.] IN RE THISTLE. [Mar. 27.

Infant's interest in land—Sale to pay for improvements—53 Vict., c. 4, s. 175.

Application under s. 175 of 53 Vict., c. 4, for an order to mortgage or sell lands belonging to infants to pay for improvements to buildings on land made by mother of infants refused, it not being shown that the expenditure was properly and necessarily incurred.

F. A. McCully, for petitioners.

Province of Manitoba.

QUEEN'S BENCH.

Bain, J.] KNOX v. MUNRO. [March 1.

Contract of hiring—Leaving service before expiry of term—Quantum meruit.

Appeal from a County Court.

The plaintiff's claim was for four months' wages at \$17 per month. He swore that the hiring was by the month, at \$17 per month ; but defen-

dant stated that the hiring was for a definite period of eight months for \$130, no time having been fixed for payment, and his account was corroborated by a witness who was present when the bargain was made.

Plaintiff left the service of defendant after four months, without defendant's consent, and without any valid reason or excuse.

The County Court Judge held that the minds of the parties had not met as to the terms or duration of the intended contract, and that as the plaintiff had worked four full months, he should be allowed for his work on a quantum meruit.

Held, that even if the plaintiff had misunderstood the legal effect of the bargain he had made, he was still bound by it: *Smith v. Hughes*, L.R. 6 Q.B. 597; and that he could not recover anything for his services without fully completing his contract. *

Cutter v. Powell, 2 Smith's L.C. 1, and *Britain v. Rossiter*, 11 Q.B.D. 123, followed. Appeal allowed with costs.

J. D. Cameron, Q.C., for plaintiff. *West*, for defendant.

Full Court.]

CLOUTIER v. GEORGESON.

[March 10.

Exemptions—Assignment for creditors—Selection of exemptions by assignee when assignor neglects to make choice—Assignments Act, R.S.M. c. 7, s. 3—Exemptions Act, R.S.M. c. 53, s. 43.

The plaintiff, a merchant, made an assignment in the usual statutory form of all his stock in trade, and personal property, etc., liable to seizure under execution to the defendant in trust for creditors.

Amongst the chattels in the store were the following: Shelving, drawers and counters valued at \$700, a staircase valued at \$100, and a number of small machines, a safe, tables, chairs, show cases and other shop furniture valued at \$501.10; all of which were set forth in the inventory with the knowledge and consent of plaintiff. All these articles were included in the sale made by defendant by auction at 60 cents on the dollar of the valuations; but, before the sale was completed, the plaintiff's solicitors notified the defendant that the plaintiff claimed the "fixtures" in the shop as not being liable to execution, and the landlord claimed the shelving, drawers and counters. Defendant then abandoned the latter to the landlord and left the staircase on the premises, but received and distributed the purchase money of the other goods including those above mentioned as valued at \$501.10.

A considerable time afterwards the plaintiff claimed that these articles were exempt under sub-s. (f) of s. 53 of The Exemptions Act, R.S.M. c. 83, which specifies: "tools . . . and necessities used . . . in the practice of his trade, profession or occupation to the value of five hundred dollars," and had not passed by the assignment. He then brought this action to recover their value.

Held, that the assignee had a right to select the exemptions in the absence of a selection by the assignor, and having appropriated only a portion of the property coming under the head of necessities exempted by the statute, and left over \$500 worth, was not liable to an action for the value or proceeds of the portion sold.

Appeal from RICHARDS, J., dismissed with costs.

Howell, Q.C., and *Mathers*, for plaintiff. *Tupper*, Q.C., and *Phippen*, for defendant.

Bain, J.]

IN RE ST. BONIFACE ELECTION.

[March 10.

Election petition—Preliminary objections—Proof of deposit of security required—Evidence that notes deposited were current money of Canada—Notice of presentation of petition—Manitoba Controverted Elections Act, R.S.M. c. 29, s. 22.

Hearing of preliminary objections to an election petition.

Counsel for respondent contended that it was necessary to prove that the Dominion notes deposited as security on the filing of the petition were genuine notes and signed by the proper officials with the same strictness as would be required in proving any other documents before the Court, and that the identical notes must be produced on the hearing. It was shown that all the notes in question had been handed out by one bank to the petitioner's solicitor as Dominion notes in payment of a cheque, that they had been deposited with the prothonotary as security, and that the latter had deposited them with another bank which received them as cash. One of the notes was for \$500 and was produced and identified at the hearing, but the others had been paid out in the course of business, and could not be traced.

Held, that the evidence adduced was sufficient to prove that the petitioner had furnished the security required by section 22 of the Manitoba Controverted Elections Act, R.S.M. c. 29. Such notes being legal tender by statute are treated to all intents and purposes as money or cash and cannot be compared to ordinary promissory notes or evidences of debt: *Miller v. Race*, 1 Smith's L.C. 468.

The petition filed asked not only that the election be declared null and void, but also that the respondent should be personally disqualified, but the notice of presentation that was served contained no reference to the latter part of the petition.

Held, following *Randal v. Powell*, 34 C.L.J. 634, that this was not necessary.

Andrews and Bernice, for petitioner. *Wilson*, for respondent.

Province of British Columbia.

SUPREME COURT.

McColl, C.J.]

IN RE LEY.

[Jan. 23.

Creditor's Trust Deeds Act—Exemption of personal property under Homestead Act—Remuneration of trustee—Costs.

Debtors, a firm of builders, assigned under the Creditor's Trust Deeds Act, all their personal property, credits and effects that might be seized and sold under execution.

The assets were not sufficient to pay any part of the claims of ordinary creditors, and two members of the firm claimed, as exemption, chattels to the value of \$500.00 each (under the Homestead Act) selected out of the lumber and materials around the factory of the firm.

Held, on an originating summons for directions, that by the form of assignment the claimants were precluded from claiming exemption. Trustee's remuneration in this case fixed at five per centum.

Davis, Q.C., for the summons. *Williams*, for debtors. *Bowser* and *Bull*, for creditors.

Full Court.] BANK OF BRITISH COLUMBIA v. OPPENHEIMER. [Feb. 23.

Practice—Discovery—Affidavit of documents—Sufficiency of description in affidavit—Privilege.

Appeal by defendants from an order of MARTIN, J., dated 6th January, 1900, dismissing an application of the defendants for further and better particulars, and cross-appeal by plaintiffs from that part of the said order of MARTIN, J., which ordered that the paragraph claiming exemption in Mr. Murray's affidavit should be struck out. The action was on promissory notes indorsed by defendants. The defendants obtained the common order of discovery, and Mr. Murray, the plaintiff's manager, filed an affidavit setting out in a schedule all the documents in his possession; and at the end he gave this description: "Various dates. Plaintiffs' books of account showing their dealings with the defendant Horne in relation to the promissory notes sued on herein." On November 4th, the defendants took out a summons for a further affidavit of documents, and particularly of the documents above mentioned. On 7th November, Murray filed a further affidavit stating that the documents consisted of voluminous entries from 30th March, 1892, to 24th August, 1894, in the current ledgers and bill registers, which they objected to produce as they contained nothing to impeach the plaintiff's case, or support the defendants as they related to defendant Horne's accounts.

MARTIN, J., dismissed the application for better particulars and ordered the paragraph in Mr. Murray's affidavit claiming exemption to be struck out.

Held, on appeal (IRVING, J., dissenting), that the description of the documents in the affidavit on production was sufficient. *Held*, also, that although privilege was claimed for the first time in a supplementary affidavit filed subsequently to the issue of a summons for a further and better affidavit, this affidavit defeated the summons and that the claim of privilege must be allowed.

Duff, for defendants. *Hunter*, for plaintiffs.

Full Court.]

BELL v. MITCHELL.

[Jan. 27.

County Court Judge—Sitting in county other than his own—Jurisdiction of when requested so to sit by Supreme Court Judge.

Appeal from an order made in an action in the County Court of Vancouver by his Honour JUDGE BOLE, directing an issue. The appeal was taken as a test case to determine the question as to whether or not the presiding judge of the County Court of New Westminster has jurisdiction to try cases in the County Court of Vancouver when requested so to act by one of the judges of the Supreme Court, in this case the request being made by the Chief Justice. There is no County Court Judge of Vancouver but the Chief Justice had been acting in that capacity.

Held, allowing the appeal, that the County Court Judge had no jurisdiction to sit by virtue of such request, and that section 8 of the County Court Act empowers only a County Court Judge to make such request.

Irving, J.

TILLEY v. CONFEDERATION LIFE.

[March 3.

Life Insurance—Premium Note — Non-payment — Forfeiture — Extended Insurance.

A life policy was issued 27th June, 1894, for \$5,000.00, an annual premium of \$84.50 being payable on the 20th of March in each year. The second premium was paid 20th March, 1895, but the third was not paid, the insured giving a note dated 20th March, 1896, at ninety days instead, the note providing that if it was not paid at maturity the policy should become null and void but subject, on subsequent payment, to reinstatement under the rules for lapsed policies. Payments on account of the note were made, and in February, 1898, the insured died.

Held, in an action by the beneficiary that the giving of the note was not a payment of the premium such as would entitle the insured to the extended insurance allowed in case three full annual premiums had been paid.

Wilson, Q.C., and *Bloomfield*, for plaintiff. *McPhillips*, Q.C., for the defendants.

North-West Territories.

SUPREME COURT.

NORTHERN ALBERTA JUDICIAL DISTRICT.

Scott, J.]

PARRSLOW v. COCHRANE.

[Feb.

Dominion Elections Act—Executory contract referring to an election thereunder—Hiring teams and conveyances—Wife's authority to contract on behalf of her husband.

The plaintiff, a livery stable keeper, sued the defendant on an account for horses and rigs furnished by him to the defendant, who was a candidate at an election of a Member of the House of Commons of Canada for the Electoral District of Alberta, held on the 23rd June, 1896. The horses and rigs furnished were used by the defendant in connection with the said election.

Held, following *Luke v. Perry*, 12 U.C.C.P. 424, that the contract of hiring was an executory one, and that it came therefore within the terms of s. 131 of the Dominion Elections Act, which is incorporated with the North-West Territories Representation Act by 57 & 58 Vict., c. 15, s. 10 (D.) and that the contract was therefore void in law, and the plaintiff could not recover.

The plaintiff also sued the defendant on another account for horses and rigs furnished by one Pepper, some of them to the defendant, others to the defendant's wife, and some to both of them, which account had been assigned to the plaintiff. These horses and rigs were not shown to have been furnished in connection with the election. It appeared in evidence that the defendant had instructed Pepper to charge to his account any rigs furnished to his wife, and that the defendant on many previous occasions, paid for rigs so furnished.

Held, that the defendant had by his ratification of these prior transactions and by his conduct, authorized his wife to pledge his credit, and that the plaintiff was entitled to recover.

Held also, with reference to the rigs furnished to the defendant himself, that when the defendant seeks to rely upon provisions of the statute to avoid liability upon an executory contract alleged to have referred to, or arisen out of an election, nothing should be intended in favour of such a defence, and it must clearly appear that such contract did refer to an election held under the Act.

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STATUTORY RIGHTS OF BENEFICIARIES OF INSURANCE POLICIES.

1. Introductory.

I. GENERAL PRINCIPLES.

- 2. Object and effect of the statutes as a whole.**
- 3. Insolvency of the insured not fatal to the validity of a trust under the statutes.**
- 4. Conflict of laws.**

II. CREATION OF THE TRUST UNDER GENERAL STATUTES.

- 5. Summary of English Acts.**
- 6. Summary of Canadian Acts.**
- 7. What settlements are within the purview of the statutes.**
- 8. To what extent the common law rights of the insured are affected by the statutes.**
- 9. Retroactive effect of statutes.**
- 10. Will of the insured a "writing" within the meaning of sec. 5 of the Ontario Act.**

III. SETTLORS CONTROL OF THE TRUST FUND AFTER THE CREATION OF THE TRUST.

- 11. Generally.**
- 12. Decisions under the Ontario Act of 47 Vict., c. 20; sec. 6.**
- 13. Decisions under late Ontario Acts.**
- 14. Effect of other statutory provisions in regard to variation of trust.**
- 15. Rule where beneficiaries predecease the insured.**
- 16. Rule where a wife, after being designated as beneficiary, is divorced.**

IV. CREATION AND MODIFICATION OF TRUSTS UNDER THE ENGLISH CUSTOMS ANNUITY ACT.

- 17. Nature and object of the fund generally.**
- 18. Decisions under the Act.**

V. APPLICATION OF THE TRUST FUND AFTER THE SETTLOR'S DEATH.

- 19. Apportionment of the fund where none is specifically made by the settlor.**
- 20. The interest of each beneficiary in the trust fund, several, not joint.**

21. Beneficiary's interest in the fund, contingent merely.
22. "Legal heirs," who are.
23. Return of premiums to beneficiary found not to be entitled to the insurance moneys.
24. Application of the fund where the assured person is murdered by the beneficiary.
25. Right of appointment, how far within the Succession Duty Act.
- VI. FIDUCIARY CONTROL OF THE TRUST FUND AFTER THE SETTLOR'S DEATH.
26. Generally.
27. Security, when required from trustees.
28. Discretion of the trustees as to the disposition of the policy moneys.
29. Designation of executors as payees of the policy moneys, result of.

1. **Introductory.**—The practice of employing life insurance policies as a medium for setting apart a fund for the support of dependent relatives is so widespread that the construction of the statutes by which trusts of this description are regulated is a matter of special interest and importance, not merely to the legal profession, but to every member of the community. It is hoped, therefore, that an analysis and collation of all the reported English and Canadian decisions with regard to this kind of legislation will be acceptable to our readers. In the following discussion no notice will be taken, except incidentally, of any cases except those in which the effect of the statutes themselves was directly in question. For information as to the rights of beneficiaries of policies, in so far as such rights are determined by the general doctrines of insurance law, or by the rules of the insurers, the various standard treatises may be consulted. The scope of the article, as well as the limited space available, will also preclude our commenting upon any statutory provisions, except those which have become the subject of litigation.

1. GENERAL PRINCIPLES.

2. **Object and effect of the statutes as a whole.**—The broad principle which the legislature has sanctioned by the Acts with which we are concerned is "that a man may provide for his wife and children at the possible expense of his creditors, and may devote his earnings to keep up insurances which are unassailable

by those to whom he may be, or may die, heavily indebted" (a). The assured, accordingly, has no power to defeat the claim of a "preferred beneficiary," except by non-payment of premiums (b). Whether, supposing he should deliberately undertake to dis-appoint his beneficiary in this manner, he might be checkmated if the premiums were tendered by, or in behalf of, the beneficiary, is a question which does not seem to have been discussed. That a section dealing with such a contingency might advantageously be inserted in the statutes scarcely admits of a doubt; though it may be conceded that, in view of the large privileges which in some jurisdictions insurers now possess with respect to transferring the benefits from one beneficiary to another (see III, post), such a provision would be of practical advantage only in cases where the beneficiary already designated is the only living representative of the class of persons to which new apportionments are restricted.

3. Insolvency of the assured not fatal to the validity of a trust under the statutes.—It has been held that a policy taken out under the provisions of the English Married Woman's Property Act of 1870 (see sec. 5, post), for the benefit of wife and children is not settled property within the meaning of sec. 91 of the Bankruptcy Act of 1869, which avoids settlements of property by a trader upon his wife and children, in case he becomes bankrupt within two years after the settlement. To this extent the earlier Act is modified by the later one, the intention of the legislature being to alter the law so far as regards the insurance of a man's life for the benefit of his wife and children, and to declare that the creditors

(a) *McKibbin v. Feegan* (1893) 21 Ont. App. 87, per Hagarty, C.J.O. Similar views are expressed in other cases. "When once a policy is issued in favour of wife or children, it becomes an irrevocable trust, placing it not only beyond the reach of creditors, but beyond the control of the husband." *Fisher v. Fisher* (1898) 25 Ont. App. 108, per Burton, C.J.O. The spirit of the Act is that, "such settlements once made are beyond the control of the settlor." *Fisher v. Fisher* (1898) 25 Ont. App. 108, per MacLennan, J.A. (p. 117). See also the remarks of Osler, J. A., on p. 118. "The object and intent of the Legislature was that the insurance money in such a policy should be paid directly to the wife and children, in their several rights, and not to the personal representatives of the insured. *Campbell v. National L. Ins. Co.* (1873) 34 U.C. Q.B. 35, (said of the earliest Canadian Act on the subject, 29 Vict., c. 17). Speaking of this Act in another case, Osler, J. A. remarked that its effect "was to enable a man by means of a policy of insurance on his life to make a sort of post nuptial settlement upon his wife and children which should be free from the claims of his creditors." *Wicksteed v. Monro* (1885) 13 Ont. App. 286. But the more recent legislation provides also for declaration of trust prior to and in contemplation of marriage. See sec. 6, post.

(b) *Fisher v. Fisher* (1898) 25 Ont. App. 108.

could only get what they would fairly be entitled to, namely, the refunding (as provided by the Act) of such premiums as were paid in fraud of them (*a*). Where the premiums have been paid by the beneficiary himself, the insolvency of the assured is of course not a ground for paying them over to the creditors (*b*).

4. Conflict of laws.—An indorsement on a policy declaring it to be for the benefit of a wife (see secs. 5, 6, post) is governed by the law of the province where it is made and the assured is domiciled, and not by the law of the province where the insuring company has its principal offices and the payment of the insurance money is to be made (*a*).

II. CREATION OF THE TRUST UNDER GENERAL STATUTES.

5. Summary of English Acts.—In order that the rulings referred to in the ensuing sections may be comprehended, it will be necessary to summarize briefly the effect of the various English and Canadian statutes, so far as they are pertinent.

England: The English Married Women's Property Acts of 1870, c. 93, sec. 10, and of 1882, c. 75, sec. 11, declare that a policy of insurance effected by any married man on his own life, and, expressed upon the face of it to be for the benefit of his wife or of his wife and children, or any of them, shall be deemed a trust for their benefit, and that the moneys payable under such policy "shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured or be subject to his debts."

6. Summary of Canadian Acts.—The Acts in *Newfoundland*: (Consolidated Statutes, 1892, c. 81, sec. 11), and in *Nova Scotia* (Rev. Stat. (5th Ser.) 1884, c. 94, sec. 12) follow the English Acts of 1870, 1882.

Ontario: The provisions of the Ontario Act which regulates the manner in which the trust is created, first assumed a shape not materially different from its present one in 47 Vict., c. 20, sec. 5, afterwards

(*a*) *Holt v. Everall* (1876) 2 Ch. D. C.A. 266. In this case the special point decided was that a new policy taken out under the Act in place of one not subject to its provisions enured to the benefit of the wife, where the insured, being insolvent at the time of the surrender of the original policy, was unable to pay the premiums, and the old policy was therefore really valueless. Lord Justice James thought that, even apart from the insolvency of the insured, there was nothing of substantial value taken from the creditors, because the insured might have given up or forfeited the original policy, whenever he pleased.

The Ontario statutes and those modelled upon them also make provision for the refunding of premiums paid in fraud creditors. See Rev. Stat. Ont. 1887, c. 136, sec. 22; Rev. Stat. Ont. 1897, c. 203, sec. 151 (2).

(*b*) *Holt v. Everall* (1876) 2 Ch. D. C.A. 266.

(*a*) *Toronto &c. Co. v. Sewell* (1889) 17 Ont. R. 442, per Ferguson J.

incorporated in R.S.O. 1887, c. 136, sec. 5, and can be traced in their development through the Dominion Statutes; 29 Vict., c. 17, sec. 3, and the Ontario Statutes, 35 Vict., c. 16, sec. 4; 36 Vict., c. 19, sec. 5; R.S.O. 1877, c. 13., sec. 16. It runs as follows: (1) In case a policy of insurance effected by a married (a) man on his life, is expressed on the face of it to be for the benefit of his wife or of his wife's children, or any of them, or in case he has heretofore indorsed, or may hereafter indorse, or by any writing identifying the policy by its number, or otherwise has made or may hereafter make a declaration that it is for the benefit of his wife and children or any of them, such policy shall enure, and be deemed a trust for the benefit of his wife, for her separate use, and of his children, or any of them, according to the intent so expressed or declared, and so long as any object of the trust remains, the money payable under the policy shall not be subject to the control of the husband or of his creditors, (b) or form part of his estate when the sum secured by the policy becomes payable.

The provision now in force, 60 Vict., c. 36 (Rev. Stat. Ont., 1897, c. 203), sec. 159, embodies the Act of 1887 as modified and extended by the various amendments of the Act last referred to. See 53 Vict., c. 39, secs. 4, 5; 56 Vict., c. 32, sec. 8 (1) (2); 59 Vict., c. 45, sec. 2.

Sub-sec. 1 is quite similar to sec. 5 of the earlier Act, the principal differences being that the word "married" is omitted as a characterization of the insurer, and the list of allowable beneficiaries is extended so as to include the husband, wife, children, grandchildren, and mother of the

(a) In a case turning upon the meaning of this word, it was held by Ferguson, J. that an indorsement made after marriage in favour of a wife is not within the purview of the Act, as it applied only to insurance effected by men who were actually married at the time. *Toronto &c. Co. v. Sewell* (1889) 17 Ont. R. 442. The opinion was based on the grounds that the original Act of 1865 made special provision for indorsing policies taken out before marriage, but gave only one year for doing this; that the substance of sec. 5 first appeared in the Married Women's Property Act; and that sec. 3 presupposes the insurer to be a married man. Sec. 1, it was said, did not in any way change the meaning of sec. 5. Where the words of the certificate entitle the beneficiary to receive the specified sum absolutely and unconditionally, an obligation to elect to accept the money in satisfaction of a claim owed by the insured to the beneficiary cannot be fastened on the apparent right thus created, unless such obligation is evidenced by something as formal as the Act requires in cases where there are changes in the designation of or apportionment among beneficiaries. Oral declarations made by the insured before, at the time of, and after his application, and also after the date of the issue of the certificate, are not sufficient to countervail the Act, or convert the beneficiary into a trustee, or to place him in the position of one who was bound to receive the money as a satisfaction of a legal claim: *In re Mills* (1897) 28 Ont. R. 563.

(b) The declaration in the first Act, 29 Vict., c. 17, sec. 5, was simply that the moneys were to be free from the claims of "creditors." This ambiguous phrase was interpreted in Lower Canada as including the creditors both of the wife and the husband. *Vilbon v. Marsonin*, 18 L.C. Jur. 249. But as remarked in a recent Ontario case, the amended Act protects the beneficiary against the claims of the creditors of the assured, but not against the claims of his own creditors. *Graham v. Canada &c. Co.* (1894) 24 Ont. R. 607.

assured. By sub-sec. 2 these are to be known as "preferred beneficiaries," all others being considered as "ordinary beneficiaries." Sub-secs. 3-6 (53 Vict., c. 39, secs. 2, 3) have the general effect of bringing policies effected before marriage within the scope of the Act, and provide for the contingency of the marriage not taking place.

British Columbia: "The Families' Insurance Act," Revised Statutes, 1897, c. 104, sec. 7, is substantially the same as the Ontario Act.

New Brunswick: The Act of 58 Vict., c. 25, sec. 6, is substantially the same as the present Ontario Act.

Quebec: Secs. 2, 5, 6, 26 of the Act of 41-42 Vict. (now replaced by the Civil Code, secs. 5581, 5584, 5604) cover the same ground as the sections of the three Acts last referred to, and are substantially to the same effect.

Manitoba: "The Life Assurance Act," Revised Statutes, 1891, c. 88, follows in secs. 2-4, 26, the Quebec Civil Code.

7. What settlements are within the purview of the statutes.—In *Holt v. Everall* (a), Mellish, L.J., remarked that it might be doubtful whether, before the passage of the Married Women's Property Act of 1870, a simple declaration on the face of a policy that it was for the benefit of his wife and children would have been sufficient to make a trust for them. More recently still Lord Esher expressed the opinion that, apart from the provisions of the Act, a policy stating that, for the considerations therein mentioned, the insuring association made the insured a member, and promised that on his death the policy money should be paid to his wife if then living, otherwise to his legal personal representatives, did not create a trust in her favour. Fry and Lopes, L.L.J., took the same view, the former remarking that, independently of the statute, she was a stranger to the contract, that it might have been put an end to by the contracting parties with her consent, and that the breach of it would have given her no cause of action against anyone (b).

The essential result, therefore, of the statute in question and those which are cast in a similar mould, seems to be merely that words which, without it, would neither create an irrevocable trust

(a) 2 Ch. D (1876) 266.

(b) *Cleaver v. Mutual etc., Assoc'n.* [1892] 1 Q.B. 14, followed as to this point in *Gunter v. Williams* (1897) 1 N.B. Eq. 401, where an assignment of a policy made prior to the Act of 1895 (58 Vict., c. 25), without the wife's consent was upheld. Compare also *Fisher v. Fisher*, 25 Ont. App. 108, discussed *infra*, where the conclusion of the majority in favour of the beneficiary, under a policy resembling that in the *Cleaver* case, was arrived at only by construing the application, which contained the statutory terms, "for the benefit of, etc.," in connection with the certificate. (See especially the concluding paragraph of the opinion of MacLennan, J.A.).

which equity would enforce, nor a contract upon which the beneficiary could maintain an action will, by its aid, now operate so as to give the beneficiary a vested and enforceable right to the policy moneys from which neither the settlor nor his creditors can derogate (c).

In a case arising under sec. 5 of Rev. Stat. Ont. 1887, it was held that an endorsement in favour of a daughter on a policy which is issued by a benevolent society and declared to be payable to the "widow or orphans or personal representatives" of the assured creates a valid trust within the purview of the Act, though it is not in terms "for the benefit" of the persons there specified (d). And quite recently the general rule governing such cases under the Ontario Acts has been stated thus: It is not necessary that the policy or other instrument should be expressed to be made in pursuance of the Act. If it is such a policy or declaration as is mentioned in the Act, that is sufficient (e).

The original Canadian Act of 1865 was applicable only to policies of life insurance the proceeds of which were payable at

(c) One of the points decided in *Holt v. Everall*, supra was that a policy expressed to have been effected by a married man on his own life and to be for the benefit of his wife was prima facie within sec. 10 of the English Act of 1870. In England the common practice seems to be to refer expressly to the provisions of the Act. See, for example, *In re Davies Policy Trusts* (1892) 1 Ch. 90; *In re Adam's Policy Trusts* (1883) 23 Ch. D. 525; *In re Kuyper's Policy Trusts* (1899) 1 Ch. 38.

(d) *Scott v. Scott* (1890) 20 Ont. R. 313.

(e) *Fisher v. Fisher* (1898) 25 Ont. App. 108, per Osler, J.A. (p. 118) [referring to *Holt v. Everall*, supra]. In this case the certificate was in the form of a covenant with the settlor by which a friendly society was to pay the benefit "to A., his wife, or such other beneficiaries as he might in his lifetime have designated in writing endorsed on the certificate, and in default of any such designation, to his legal representatives." The theory of Street, J., 28 Ont. R. 459, was that, while three beneficiaries were mentioned, there were in effect only two, and that, in order to become a beneficiary, the wife must be endorsed as such. The view of the Court of Appeal was that the covenant was to pay the wife, or some other person, that other person to be designated by indorsement. That the certificate came within the act was held by the majority of the Court, who considered that the fact of there being no designation in writing on the face of the certificate or elsewhere, constituting the wife of the assured a beneficiary would not prevent the document from operating as an irrevocable statutory trust in her favour, inasmuch as the assured in his application stated that the money was to be paid to his wife, and the insuring society used a printed form in which the person described as the wife of the assured is designated as his beneficiary. Her rights were accordingly pronounced superior to those of creditors to whom the deceased had undertaken to assign the policy. Osler, J.A., dissented on the ground that the application could not be referred to for the purpose of construing the certificate; that the Court was bound to assume that the assured was satisfied with it in the form in which it issued, though as regards the beneficiary, it varied from the request made by the application; and that there was nothing in the Act to forbid the assured from attaching such conditions as he pleased to the settlement.

the death of the insured, endowment policies being excluded for reasons thus explained by Burton, C.J.O. in a very recent decision :

"The legislature very wisely and humanely passed an Act to secure to wives and children the benefit of life assurance, but, having regard to the interests of creditors, endowment policies were not included in its provisions, it being thought, not probably without some reason, that the Act might be used by dishonest persons as a means of protecting against creditors for a number of years a fund which might at the maturity of the policy be appropriated by them to their own use instead of the support of the wife and children, when, as originally intended, the moneys were payable at his death as a provision for them" (*f*).

But in 1877 it was held that the expanded Act of 47 Vict., c. 20, (Rev. Stat. Ont., 1887, c. 136), being applicable to all contracts of life insurance, comprehended insurances effected under the Benevolent Societies Act (Rev. Stat. Ont. 1877) c. 167 (*g*). And now by 51 Vict., c. 22, Providence and Benefit Societies are expressly brought under the provisions of Rev. Stat. Ont., c. 136 (*h*). See also *Mingeaud v. Packer*, cited in sec. 12, post.

8. To what extent the common law rights of the insured are affected by these statutes. (See also sec. 8, post.)—In *Holt v. Everall* (*a*) Lord Justice Mellish mentioned, as a doctrine not disputed, that prior to the passage of the English Act of 1870 anyone might, either upon the policy itself or by another instrument, have declared a trust in the proceeds for the benefit of his wife for her separate use, and after her death for the use of her children (*a*). But neither in that statute nor in those which have been enacted in Canada upon the same model (sec. 6, ante) is there any express declaratory provision as to their precise effect upon this pre-existing right. Nor have we come across any case which discusses whether, and if so, how far that right is impliedly restricted by them. It may, however, be fairly inferred that, upon the general principles which determine the proper construction of statutes which create new capacities without mentioning those which previously existed in respect to the subject-matter covered, it was not intended to cut

(*f*) *Fisher v. Fisher* (1898) 25 Ont. App. 108.

(*g*) *Swift v. Provincial etc., Institutions* (1890) 17 Ont. App. 66, (Burton, J.A., dissenting), overruling *Re O'Heron*, 11 P. R. 422.

(*h*) See *Neilson v. Trusts Corporation* (1894) 24 Ont. R. 517; *Fisher v. Fisher* (1898) 25 Ont. App. 108.

(*a*) 23 Ch. D. (1876) 266.

down the right in question. The only point, therefore, which can create any difficulty in this connection is whether, in any particular instance, the assured wished that his contract should be governed by the statutes or by the ordinary rules of equity jurisprudence. As will be seen by referring to the preceding section, *Holt v. Everall* is an authority, though not a very positive one, for the doctrine that any policy which is *prima facie* within the Act will, in the absence of any words expressive of a different intention on the part of the assured, be presumed to raise a trust of the kind contemplated by the legislature. In view of the admitted purpose of these statutes a court would doubtless lean strongly towards this conclusion wherever, as in that case, the adverse parties claiming the fund were the beneficiary and the creditors of the assured. But it seems to be less easy to say that this inference should be drawn where there are no creditors to be considered and the assured, in making a disposition of the policy moneys which, apart from statute, would not place the fund entirely beyond his control, has not referred to the statute, and has subsequently undertaken to vary that disposition. Is such an attempt competent evidence to shew that he did not intend that the settlement originally made should be governed by the statute? Or will the *prima facie* presumption that a settlement made in the words employed by the legislature was intended to be subject to the statute always hold good unless it is rebutted by something in the original declaration which indicates a contrary intention?

As regards the Ontario Acts, it would seem, that for practical purposes, though not in express terms, the courts have answered the latter of these questions in the affirmative by their decisions as to the inability of the assured to derogate from the rights of the original beneficiaries except in the manner authorized by the Insurance Acts. (See sec. 11, post). These rulings apparently take it for granted, not only that a declaration which is merely to the effect that the insurance moneys are for the benefit of a designated person, and which therefore does not, apart from the statute, create an irrevocable trust, presumptively operates so as to raise such a trust, but also that this presumption is not overborne by the subsequent action of the settlor in attempting to change the settlement. The virtual result of these cases, therefore, seems to be this:—A settlor, if he desires to avail himself of the doctrine, founded upon the provisions in these Acts and others like them,

that his common law rights to procure or to assign a policy in any other way allowed by law are deemed not to be restricted or interfered with, and that the common law and statutory rights of creditors are superseded so far as may be necessary to give effect to the Act and no further, (b) must make an express declaration, at the time the trust is created, that the statute is not to be applicable to the contract. It seems difficult at all events to suggest any other practical footing upon which these provisions can be reconciled with those which declare that the Acts shall be applicable to every contract of life insurance. (See, for example, sec. 1 of R.S.O. 1887, c. 136.)

Of course where a trust is valid apart from the statute, the fact that the beneficiary is not one of these persons for whose benefit it was enacted will not prevent it being upheld (c).

9. Retroactive effect of Statutes. (See also under sec. 26, post.)—In *Wicksteed v. Munro* (a), Ferguson, J. expressed the opinion that c. 129 of R.S.O. 1877, was applicable to a policy taken out under the Act of 1865, as it embodied the Act of 33 Vict., c. 21, sec. 6, which itself took effect upon policies issued before its passage, but the Court of Appeal declined to make a ruling on this point.

In the same case Ferguson, J. remarked that, if the Act of 47 Vict., c. 20, sec. 9, dealing with the result of the predecease of beneficiaries, (see sec. 15 post), had been applicable to a policy under the Act of 1865, it would have been conclusive in favour of the defendants' contention, but that by the repealing clause acts done or rights acquired were expressly excepted from its operation.

The provision in the Ontario Act of 53 Vict., c. 39, sec. 5 by which, if the mother of the insured is made a beneficiary in the original contract, a trust is created in her favour, was held applicable to

(b) *Wicksteed v. Munro* (1885) 13 Ont. App. 486. See also *Fisher v. Fisher* (1898) 25 Ont. App. 108 (p. 117). The provisions referred to are found in 29 Vict., c. 17, sec. 6; R.S.O. 1877, c. 129, sec. 18; 47 Vict., c. 20, sec. 22; R.S.O. (1887) c. 136, sec. 23; 60 Vict., c. 36, sec. 151 (5).

(c) *Re Roddick* (1896) 27 Ont. R. 537, holding that the sisters of the insured, though not within the protection of R.S.O. 1887, c. 136 take, as against the creditors, where they are named in the policy as beneficiaries, and it is not shewn that the insured was not in a position to make voluntary settlement at the time he effected the insurance.

(a) 10 Ont. R. (1885) 283; 13 App. 486. See the statement of the case sec. 21, post.

current policies, issued before it came into force (*c*). In this instance there was no express announcement in the statute as to the retrospective effect of the section under review; but in two later decisions the meaning of a clause stating that the Act should apply to any contract of insurance heretofore issued or declaration heretofore made (*e*) has been a material question. This provision has been held to cover a case where the insured died before it came into force (*f*), but not one where not only was the insured dead, but the money had been paid out under the law as it then stood (*g*).

The theory of Meredith, C. J. in the case last cited, was that in *Videan v. Westover*, supra, the insurance money had not yet been paid over when the Act came into force, and that this fact furnished an adequate ground for not following the ruling of Ferguson, J. He considered that the words "any contract of insurance" meant any existing or current contract, and the words "declaration heretofore made" meant a declaration in respect to such existing or current contract, not in respect to one which was altogether a thing of the past, wholly performed and ended, and so not at the time a contract at all.

It is extremely difficult, however, to admit that the circumstance relied upon can furnish an adequate basis for a distinction between the two cases. Whatever moneys the beneficiary is to receive upon the death of the insured became absolutely his own property the very moment the insured dies. The mere fact that such moneys may have remained in the keeping of the insurers after that death does not make them any the less the property of the beneficiary than if they have been paid over. The effect of a statutory provision like the one in question must, it is submitted, be precisely the same in all cases where the insured was dead before its enactment. If our contention be correct, it becomes necessary to choose between the rulings of Ferguson, J. and of Meredith, C. J., and we have no hesitation in saying that we prefer the construction put upon the Act by the latter judge. The situation is, we think, one for the application of the rule by which the intention of the legislature to

(*c*) *Simmons v. Simmons* (1893) 24 Ont. R. 662, per Chancellor Boyd. This construction was embodied in 59 Vict., c. 45, sec. 1 (2).

(*e*) 60 Vict., c. 36, secs. 159 (9) 160 (5).

(*f*) *Videan v. Westover* (1897) 29 Ont. R. 1, per Ferguson, J.

(*g*) *McIntyre v. Silcox* (1898) 29 Ont. R. 593.

derogate from rights already reduced to possession under an existing statute is not to be presumed in the absence of an express declaration to that effect in the substituted statute (*h*).

10. That the will of the insured is a "writing" within the meaning of sec. 5 of the Ontario Act was first laid down by Chancellor Boyd (*a*) in a judgment which, in view of the importance of the question, must be pronounced rather brief and perfunctory. The only answer which the learned judge vouchsafed to the suggestion that the statute is not satisfied by the execution of a revocable instrument, and that the declaration by the separate instrument should, like the indorsement on the policy, be final in its character, was that the declaration was made by the statute subject to variation and correction at the option of the insured within the limits prescribed (sec. 12, post). Clearly, however, the power to vary the terms of a trust is essentially different from the power to revoke it altogether, and resume entire control of the property.

In the same year as the last cited of the Chancellor's decisions was rendered, the question came before the Court of Appeal, and his views were adopted by two out of three of the justices (*b*).

Hagarty, C.J.O. candidly admitted that the decision might have "the effect of, in some cases making the trust for the wife and children of the insured revocable, which it might not be when endorsed on the policy under the statute," and that "his making the declaration in the present form was worthless, unless and until it appeared as his last will, and as an irrevocable declaration of the trust," but said that he was unable to see that in substance a revoked will differed from an ineffectual or defective attempt to declare a trust on an existing policy.

With all deference it is submitted that the difference between the supposed cases is perfectly manifest. A will creates inchoate rights, contingent upon its being left unaltered by the testator. No rights whatsoever, contingent or otherwise, can arise out of a mere ineffectual attempt to perform a legal act. An argument which assumes that the situation resulting from the invalid execution of one instrument may supply an analogy indicating the intention of the legislature with regard to the consequences which are to follow

(*h*) Endlich on Statutory Construction, sec. 273: Dwarries on Stat. (Potter's Ed.) p. 162.

(*a*) *Re Lynn* (1891) 20 Ont. R. 475, followed without any discussion by the same judge in *Beam v. Beam* (1893) 24 Ont. R. 189.

(*b*) *McKibbin v. Feegan* (1893) 21 Ont. App. 87.

the valid execution of another instrument is not a very satisfactory specimen of judicial ratiocination.

The starting point of the argument of MacLennan, J.A., was that the word "writing" was wide enough to include a will, and that there was no reason apparent why a declaration by will should not be sufficient. The proposition contained in the first of these clauses is of course uncontrovertable, as an abstract legal statement, but we venture to think that the reasoning by which the second proposition is sustained is defective in more than one respect.

The learned judge laid special emphasis upon the fact that there was nothing in the Act which expressly forbade a revocable declaration of trust, nor anything from which a prohibition could be inferred, and continued thus: "The legislature intended to enable a husband and father to make a provision for his wife and family, for their benefit, after his death and not before. He may make it any time: may wait until he is in extremis, and if he might, as he may, make it by writing other than a will just before death, why might he not do it by will?"

This last argument which seems to be approved by Chief Justice Hagarty, as he also points out that the insured could have had the policy indorsed or made the necessary declaration before he died, proceeds upon the hypothesis that events which are so nearly simultaneous as the supposed communication of an irrevocable quality to the trust through a declaration made shortly before death and through the actual decease which brings the provisions of the will into effect, must necessarily possess the same legal significance. Even if the statute itself be alone taken into account, such a theory is, as Osler J. A. very truly remarked in the dissenting opinion which will presently be reviewed, a mere begging of the question. That this is actually the logical dilemma in which the majority of the court has involved itself is indicated by nothing more strongly than by the fact that their doctrine ignores entirely the fundamental distinction which the law makes between voluntary transfers of chattels by transactions *ultra vires* and by testamentary directions. That the legislature had this distinction in mind when the statute was framed, seems to us indisputable when we observe that the provisions appointing the means by which the trust can be created during the lifetime of the insured, have simply given a statutory sanction to an extension of the methods by which equity had already succeeded in practically circumventing the common law principle that the property in a

chattel does not pass without delivery of the thing itself or what is equivalent thereto (*d*). This principle is as fully applicable to an attempted transfer just before death, that is to say, to a *donatio causâ mortis*, as it is to an attempted transfer by a man who is in sound health and not contemplating death; but it has no application to a legacy. It seems impossible, therefore, to avoid the conclusion that the reasoning of the learned judges is here based upon a misconception of the legal situation, and that the considerations emphasized are quite irrelevant as aids to the ascertainment of the intention of the legislature.

After the passage above quoted, the opinion of Maclellan, J.A. proceeds thus: "The Act enables him to settle the whole policy, or several policies. Why should he not, therefore, be able to settle part of a policy or the whole policy for a limited time, as for a year or two years in case of his death during that period, but not afterwards?" I see no evidence in the language used that the legislature intended to limit or restrict the power of settlement on the part of the husband in favour of his wife and children. He may settle it absolutely, and as the greater includes the less, I think he may settle it without any qualification not expressly forbidden." In replying to the argument that sec. 6 of the Act and the amendments thereof by 51 Vict., c. 22, sec. 3, and 53 Vict., c. 39, sec. 6, indicated that the settlement contemplated by sec. 5 was to be an absolute and not a revocable settlement, the learned judge put upon the first-named section a construction somewhat different from that which it had received from Chancellor Boyd. He said: "I think that the answer to that is that sec. 6 is intended to enable the settlor to change and vary the settlement, even in these cases in which he has made it absolutely, and has not reserved any power of revocation or variation."

The essential links in the learned judge's chain of reasoning, considered as a whole, seem to be fairly represented by these three propositions: "(1) As the Act does not forbid the creation of trusts which are revocable, either by their express terms or inferentially, such trusts must be regarded as being impliedly authorized; (2) Revocable trusts, being authorized by the Act, are within its purview and entitled to the peculiar protection which it affords; (3) A trust created by a will, being in its nature revocable, is one of those which the Act was intended to

(*d*. Contrast cases like *Cochran v. Moore*, 25 Q.B.D. (C.A.) 75, and *Jones v. Lock*, L.R. 1 Ch. App. 25 with such cases as *Milroy v. Lord*, 4 DeG.F. & J. 264, and *Richards v. Delbridge*, L.R. 18 Eq. 11. For a general discussion of this anomaly, an article by the present writer in the *American Law Review*, vol. 29, p. 361 may be consulted.

cover. The assumption apparently is that the logical sequence between the first and the second of these propositions, and also between the second and the third, is unbroken and manifest. With all respect, we think that this assumption is, as regards both its branches, unjustifiable.

It is one thing to say that the statute does not prevent a settlor from moulding the trust into any form he pleases; indeed there is, as already noticed (sec. 8, ante), a special saving provision to this effect in the Act itself. It is quite another thing to say that the peculiar safeguards provided by it are intended by the legislature to be applicable to revocable trusts. This last proposition must still be established by independent reasoning. Nor is the third proposition a necessary or inevitable inference from the second. Even if revocable trusts which take effect in the lifetime of the insured are in the sense just mentioned directly within the purview of the Act, it may still be a question whether this can properly be affirmed of a trust which is revocable only for the reason that it is created by an ambulatory instrument, and which never goes into effect at all until the death of the settlor. The mere fact that the existence of these gaps in their argument does not seem to have been realized by either of the learned judges who constituted the majority of the court, and that they made no attempt to bridge over such very serious logical chasms renders it impossible to avoid the conclusion that the question to be determined was not discussed by them from the proper standpoint.

It remains then to be considered whether these hiatus in their reasoning can be filled in a manner favourable to their theory, or whether an examination of the statute itself, the only source from which light upon the subject can be derived, will not shew that their conclusions are erroneous. That the latter of these alternatives is the only one which can be accepted is, we think, shewn by the able dissenting opinion of Osler, J.A., who, without undertaking to deal directly with these particular dialectic weaknesses in the arguments of his colleagues, has demonstrated very satisfactorily the unsoundness of their views as a whole.

Referring to the words contained in sec. 5, he said:

"The indorsement or writing mentioned in this section appears to me to import something by which a trust is irrevocably created for the beneficiaries therein named, subject only to be varied, as by that section and section sixth is provided. . . . The intention of the legislature

was that the policy so declared should be no longer available to the assured for his own purposes. . . .

That he had made a disposition of it by his will would be no answer to a creditor seeking the benefit of it in his lifetime, and it seems very like begging the question to say that it is only by his last will that it takes effect; for the declaration which the fifth section speaks of is evidently one which takes effect from the moment it is made, importing something which has become effectual in the declarant's lifetime, not an instrument which only becomes irrevocable by his death, and which in the meantime leaves him the benefit of the policy for his own purposes." . . .

. . . "The special power which the Act confers to vary and alter from time to time the apportionment made by the original declaration is also strong to shew that such declaration is something which has taken effect in the declarant's lifetime, which the Act specially permits him, but only within certain limits, to modify. It is most significant that the Act says nothing about making a declaration by will. It would have been the most natural thing to provide for had it been intended that the insured should be able to retain the policy within his own control during his life, and then by his will withdraw it from his creditors."

He also pointed out that secs. 8 and 9, providing that the insurer may reapportion the benefits in case of the death of a beneficiary, and that in case such reapportionment is not made, the share of the deceased shall pass to the survivors, contemplated a declaration *inter vivos*, indefeasible except with the limits specially permitted, and drew attention to the terms in which a will was mentioned in sec. 11.

It will be observed that the learned judge ascribes due weight to the fact that there is no reference to a will in sec. 5, which deals with the creation of the trust. But it is not a little remarkable that neither he nor his colleagues seem to have realized the vastly greater significance which this fact carries, owing to the mention of the will in the following section which refers only to variations of a trust already created. It is submitted that the only inference that can be drawn from this marked contrast is that the legislature, whether it did or did not intend to protect revocable trusts which have taken effect during the lifetime of the insured, certainly did not intend to protect trusts created by will.

In view of the fact that the decision of the Court of Appeal was not unanimous, it is to be regretted that in the last revision of a statute, which as to other points is so exuberantly verbose, a little space was not devoted to a declaratory clause which would put its meaning in this respect beyond dispute. Any amendment which may be made will, we hope, take the shape of a categorical

withdrawal of the statutory privileges from declarations by will. The main utility of these statutes is seriously impaired by protecting settlements which leave the insured absolutely free to put the insurance moneys at hazard during his lifetime. Experience has so clearly demonstrated the disastrous consequences which in a large percentage of cases result from the almost irresistible temptation to treat as an ordinary asset a policy which the insured intends, but has not declared to be, for the benefit of his family, that, upon grounds of social expediency the execution of settlements which, for all practical purposes, fall under this description, during the lifetime of the insured, should be discouraged in every possible way.

III. SETTLOR'S CONTROL OF THE TRUST FUND AFTER THE CREATION OF THE TRUST.

11. **Generally.**—An irrevocable trust is of course wholly beyond the control of the trustor when it has once taken effect, and as the statutes under review impart the quality of an executed trust *inter vivos* to a policy expressed to be for the benefit of wife and children (*a*), the insured cannot change its terms, either as regards the persons to be benefited, or the amounts they are to receive, unless he has reserved a power of modification or the legislature has given him that power. In the statutes of England and those Canadian provinces in which the English statute is copied, there is no provision (see sec. 6, *ante*). Under the Married Women's Property Act of 1870, the emancipation of the policy moneys and the policy itself from the husband's control is so complete that he has no power either to appoint a trustee of the policy, or even to assign it to a trustee when appointed (*b*). This particular disability has been removed by the Act of 1882, but in other respects he remains incapable of altering or adding to the provisions of the trust instrument.

(*a*) *In re Adams' Policy Trusts* (1883) 23 Ch. D. 525, per Chitty, J. The doubt which North, J., afterwards expressed as to the correctness of this view in a later case (*Seyton v. Satterthwaite*, 23 Ch. D. 525), must be considered with due reference to the point under discussion (see 19, *post*). He could scarcely have intended to impugn the soundness of the doctrine in the text, as a statement of the effect of the policy between the settlor and the beneficiaries as a body.

(*b*) *Turnbull v. Turnbull* (1897) 2 Ch. 415.

The statutes of all the Canadian provinces, except Nova Scotia and Newfoundland, confer the powers of modification, which we are about to discuss. Under all these provisions it would undoubtedly be held, as it has been with regard to the Ontario Act, that no modifications are valid except those which are expressly permitted by the statute and are made in the prescribed manner (c). Since the declaration of the insured that the policy moneys are to be paid to the designated beneficiary is deemed to sever such moneys from his estate, (see sec. 1, ante), his subsequent directions, testamentary or otherwise, cannot affect the disposition of the fund except within the limits fixed by the legislature (d).

12. *Decisions under the Ontario Act of 47 Vict., c. 20, sec. 6.*—The earliest provisions made in this province for variations of benefits or beneficiaries are found in 36 Vict., c. 19, sec. 3, (identical with Rev. Stat. Ont., 1877, c. 129, sec. 2), which empowers the insured person to allot the share of a beneficiary who dies before him to any other person, and to alter the shares and allotments of the money among the beneficiaries themselves. These were amended in sec. 6 of 47 Vict., c. 20, which appears as sec. 6 of the Rev. Stat. Ont., 1887 c. 136. Substantially their effect is as follows: "The insured, by an instrument in writing attached to or indorsed on or identifying the policy," may vary in apportionment previously made, so as to extend the benefits of the policy to the wife or children, or to one or more of these, although the prior declaration is restricted; may vary the apportionment of the insurance money; may from time to time alter the apportionment as he deems fit; and may by his will make or alter an apportionment of the insurance money.

Under this section, where one particular child had been designated as beneficiary, the settlor was held to be able by a subsequent indorsement to transfer or limit the benefits of the policy in any manner or proportion he might deem advisable between all his children (c). So also he might, by his will, reduce

(c) As to the analogous situation (not within the scope of this article), in which the extent of the power to change the beneficiaries depends on the by-laws and constitution of the insuring society, see Bacon's Benefit Societies, sec. 306-310. That the method prescribed by these instruments must be strictly complied with, see the same treatise, sec. 307. The invalidity of an attempted substitution of a beneficiary outside the designated classes is the subject of the decisions in *Morgan v. Hunt* (1895) 26 Ont. R. 568; *Leadlay v. McGregor* (1896) 11 Man. 9. The necessity of a strict compliance with the rules of the society in regard to changes of beneficiaries is recognized in *Simmons v. Simmons* (1893) 24 Ont. R. 662; *Johnston v. Catholic Mutual* (1897) 24 Ont. App. 88.

(d) *Campbell v. Dunn* (1892) 22 Ont. R. 98.

(c) *Neilson v. Trusts Corp'n* (1894) 24 Ont. R. 517.

the share of one child and add the amount of the reduction to the share of another child (*d*). But he had no power to take away entirely the share of any single beneficiary by his will and bestow it upon another, an absolute revocation of the trust not being the same thing as a variation. In one case it was held that an endorsement in favour of a daughter on a policy which was issued by a benevolent society, and expressed to be payable to the "widow or orphans or personal representatives" of the assured, created a vested trust which would prevail against the provisions of a subsequent will bequeathing the proceeds of the policy to executors upon certain trusts (*e*). In another case, Armour, C.J., and Falconbridge, J., sitting as a Divisional Court, held that the effect of the Act of 51 Vict., c. 22, extending the provisions of R.S.O. 1887, c. 136, to beneficiary certificates issued by benevolent societies, was to modify the rules of such societies in so far as they were inconsistent with those provisions, and that a certificate issued by the United Order of Workingmen became a trust for the beneficiaries named in it, under sec. 5 of the earlier of those Acts, and ceased so long as the objects of the trust (here the children of the assured) survived to be under his control, except so far as is allowed by the provisions of the section under review. These did not permit him to revoke the certificate and replace it by one in favour of a second wife (*f*). So also it was laid down that, after having designated a daughter as a beneficiary, the insured could not revoke the direction for payment to her, and make a direction for payment to his wife alone (*g*).

13. Decisions under later Ontario Acts.—The practical futility of the distinction taken in the three cases last cited was sufficiently

(*d*) *McIntyre v. Silcox* (1898) 29 Ont. R. 593.

(*e*) *Scott v. Scott* (1890) 20 Ont. R. 313, per Boyd, C.

(*f*) *Mingeaud v. Packer* (1891) 21 Ont. R. 267, reversing the judgment of Street, J. The judges of the Court of Appeal were equally divided in regard to the case (19 Ont. App. 290) Hagarty, C.J.O., and Burton, J.A., agreed with the Divisional Court, while Osler and MacLennan, J.J.A., were for restoring the judgment of Street, J., based on the theory that the rules of the society controlled the rights of the assured as to changing the beneficiary, and that these had not been complied with. The construction placed by Robertson, J., upon this case was that the will was held inoperative for the reason that the new certificate entirely ignored the beneficiaries under the first, and created a new object of the trust: *Re Cameron* (1892) 21 Ont. R. 634.

(*g*) *Nelson v. Trusts Corp'n.* (1894) 24 Ont. R. 517, following *Mingeaud v. Packer*, *supra*.

obvious, for there was nothing in the statute to prevent the insured from reducing the share of any beneficiary to a nominal amount. This consideration, as well as others, induced the legislature to extend the power of variation still further by the amending Act of 53 Vict., c. 39.

By sec. 6 of the statute it is declared that the insured "may, by an instrument in writing attached to, or indorsed on, or identifying the policy by its number or otherwise, vary a policy or a declaration in apportionment previously made so as to restrict, or extend, transfer or limit the benefits of the policy to the wife alone, or the children, or to one or more of them" irrespective of the original scheme of distribution, and also apportion or alter the apportionment of the money; and that he may by his will "make or alter the apportionment."

Prior to the passage of this Act the testator took out two policies in Benefit societies, one payable to his wife, if she survived him, and, if not, to his children, the other payable to his wife and children. After the Act came into force he made a will bequeathing to his wife one-half of all his personal property during her life or widowhood. It was held that the effect of the will was to cut down one-half of the amount of the first policy to an estate for life leaving undisturbed the right of the wife to the other moiety which therefore went to her absolutely, while as to the second policy, the apportionment was changed from the original one, which would have given her one-sixth of the fund absolutely, so that she was now entitled to one-half, but only during life and widowhood (a). As the amended section made a clear distinction between what the insured may do by an "instrument in writing," and what he might do by will, it was held that he could not by his will declare that others than those for whose benefit he has declared the policy to be, should be entitled to the insurance money (b).

This distinction between a will and other writings was done away with by the following clause in the Act of 58 Vict., c. 34, sec. 12, which was subsequently embodied in 60 Vict., c. 39 (R.S.O. 1897), sec. 160, subsec. 1. "Whatever the assured may, under this section, do by an instrument in writing attached to, or indorsed on, or identifying the policy . . . by number or otherwise, he may also do by a will identifying the policy . . . by number or otherwise."

(a) *Re Cameron* (1892) 21 Ont. R. 634.

(b) *Re Grant* (1895) 26 Ont. R. 120, aff'd 26 Ont. R. (C.A.) 485, testator held not entitled to substitute his children for his wife the beneficiary of the policy.

In a recent case in the Court of Appeal it was remarked that the effect of the Ontario legislation, as a whole, is that there may be a re-distribution of the fund among those who are now styled "preferred," as opposed to "ordinary or beneficiaries," (see sec. 6, ante), but that it cannot be alienated from these preferred beneficiaries or disposed of to a stranger, except in cases where a beneficiary dies in the lifetime of the assured (*d*). (See sec. 15, post). A daughter-in-law of the assured, being an "ordinary beneficiary" only, may be deprived of her benefit by will (*e*).

14. Effect of other statutory provisions in regard to variation of trust.—For the statute of *New Brunswick*, see the Act of 58 Vict., c. 25, sec. 7.

For the provisions in force in *British Columbia*, see Rev. Stat. 1897, c. 104, sec. 8. Both these statutes are drawn in substantially the same terms as that of Ontario.

Quebec.—The provisions now in force are secs. 12, 13, of the Act of 41-42 Vict. (now printed as secs. 5586-5591 of the Civil Code).

The similar provisions of the Statute in *Manitoba* are found in the "Life Assurance Act" of that Province, Rev. Stat. 1891, secs. 8-13.

In both Provinces the powers of revocation and alteration are unlimited so long as the beneficiary of the substituted declaration belongs to the classes of persons who are within the purview of the Act.

In a case under the Quebec Act, the husband insured his life, the insurance money being expressed to be payable to his wife, should she survive him, or, failing her, for the benefit of her children, and afterwards executed a revoking instrument. In the first paragraph of this he did not mention his wife, merely stating that he desired to revoke the benefit conferred by the insurance upon his children generally, but in the second he declared his option that the insurance should be payable to a son named therein, and not to his wife. This was held to be a sufficient revocation under the statute (*a*).

By sec. 1 of the same Act "rights accrued" under the Dominion statute of 29 Vict., c. 17, the earliest of those dealing with insurance for the benefit of wives and children (see secs. 1 and 6, ante), were excepted

(*d*) *Fisher v. Fisher* (1898) 25 Ont.R. 108. The specific effect of sec. 159 (8) of Rev. Stat. Ont. 1897, c. 203, is to deprive the assured of the right of transferring the benefits to a stranger as long as there are any survivors of the classes of preferred beneficiaries. (See sec. 13, post).

(*e*) *Videau v. Westover* (1897) 29 Ont. R. 1.

(*a*) *Rees v. Hughes* (1894) 3 Que. Off. (Q.B.) 443.

from the operation of the provisions empowering the insured to revoke the benefits and make a reapportionment.

It was held in the case last cited that the rights acquired by a beneficiary designated under the provisions of the earlier Act are for two reasons not "accrued" within the meaning of this saving clause; first, because the original statute merely grants a permission or authorization which the law as it had previously stood, had not granted; secondly, because it was not proved that the beneficiary had not expressed his acceptance of the benefit, the consequence being that his rights were determined by Art. 1029 of the Quebec Civil Code which permits the revocation of a stipulation for the benefit of a third person, where the beneficiary has not signified his assent thereto applies to insurances for the benefit of a wife effected under the Act of 29 Vict., c. 17.

15. Rule where beneficiaries predecease the insured.—The statutes of all the Canadian Provinces, except those of Newfoundland and Nova Scotia, which in this, as in other respects, resemble the English Married Women's Property Acts of 187c and 1882, make special provision for the contingency of the death of some or all the beneficiaries during the lifetime of the insured.

Ontario: By 33 Vict., c. 21, sec. 6 (R.S.O. 1877, c. 129, sec. 14), it was enacted simply that, subject to a declaration by the assured altering the allotment of the shares, the share of any beneficiary who should die before the assured was to be paid to the surviving beneficiaries, and, in default of any survivors, to his executors and administrators.

By 47 Vict. c. 20, (Rev. Stat. Ont. 1887, c. 136), secs. 8, 9, a marked distinction was made between a case in which an apportionment between the several beneficiaries had been made by an express declaration on the part of the assured, and a case in which he had not made any such apportionment. In the former case he was empowered to allot the share of the deceased beneficiary to the survivors or any of them, such share, in default of a new allotment, to become part of his estate at his death. In the latter case the share of the deceased beneficiary was to be divided equally among the surviving beneficiaries, and only to revert to the assured when they all died before him.

The provisions on this subject now in force are those in 60 Vict., c. 36 (R.S.O. 1897, c. 203), secs. 151 (6) and 159 (8). Their combined effect seems to be that in default of a reapportionment by the insured the fund is to be divided equally among the surviving beneficiaries, irrespective of the question whether an apportionment had originally been made or not, and that a reversion to the estate of the insured will in no case take place unless he survives all the beneficiaries.

In *New Brunswick* (58 Vict., c. 25, secs. 9, 10) and *British Columbia* (Rev. Stat. Ont., c. 104, secs. 10, 11) the provisions in force are the same as those of the Ontario Act of 47 Vict., c. 20, secs. 8, 9; (see above.)

The devolution or disposition of the shares of deceased beneficiaries is regulated exclusively by these sections. The power of making or altering an apportionment by will, which is conferred by the general provisions of the sections reviewed above, has no application to such cases (a).

Quebec : Under the Act of 33 Vict., c. 21, sec. 6, the policy moneys were, in the event of the beneficiaries dying before the insured, to be paid to the survivors, and, if they also died, reverted to the estate of the insured, after which he might make a new declaration for the benefit of any future wife or children.

In default of an appropriation under these sections to a second wife, a bequest to a child of the first marriage was held to be good (b).

By 41-42 Vict., c. 13, secs. 14, 15 (Que. Civ. Code, secs. 5592-93), the benefit of the policy reverts to the insured when the beneficiary predeceases him, and he then has the right to deal with the fund as if the insurance had been effected for his own benefit.

When a policy has, by virtue of these sections, reverted to the insured through the death of his wife, he will be presumed to have known that such reversion has occurred, and that he can deal with it as if it had been effected for his own benefit. Hence, where he has bequeathed the insurance money to a child, the fact that he continued to pay the premiums on the policy, after marrying a second time, will not be construed as an appropriation of the policy in favour of his second wife. The payment of the premiums under such circumstances is equally consistent with an intention to make the bequest which was actually made (c).

Manitoba : The Rev. Stat. of 1891, c. 88, sec. 11, follows the Quebec Act.

16. Where a wife, after being designated as beneficiary, is divorced, the trust fund reverts to the insured, and he may dispose of it as he pleases (a)

(a) *McIntyre v. Silcox* (1898) 29 Ont. R. 593.

(b) *In re Aetna L. Ins. Co.* (1892) 2 Que. Off. (S.C.) 392.

(c) *In re Aetna L. Ins. Co.* (1892) 2 Que. Off. (S.C.) 392.

(a) *Hart v. Tudor* (1892) 2 Que. Off. (S.C.) 534.

IV. CREATION AND MODIFICATION OF TRUSTS UNDER THE ENGLISH CUSTOMS ANNUITY ACT.

17. Nature and object of the fund generally.—This fund was established by the Act of 56 Geo. 3, c. 73. Its general object was to accumulate by the contributions of persons employed in the Customs House Department a fund which, upon the death of the contributor, should be available for the support of his widow, children, or relatives. The rules made by the directors from time to time were declared to have, after ratification by the subscribers and a judge of one of the Superior Courts of common law, the same force as if enacted in the statute itself (*a*). By sec. 9 of the Act the Directors were empowered to admit any person not a relative of a subscriber to be his nominee, and such nominee was to have the same interest in the fund as if he had been a relative.

It is sufficiently obvious that the establishment of a fund to be disposed of in the manner prescribed by the statute and the rules summarized in note (*a*) created as between the directors and the subscribers relations very closely resembling those which exist between benevolent societies of the modern type and their members (*c*). Indeed it can scarcely be doubted that the lines upon which these societies were modelled were originally suggested by the provisions of the English Act and the rules framed under it. For this reason the decisions respecting the fund are of general pertinency in the present connection.

(*a*) These rules provided substantially that the fund should be raised by subscriptions on the principle of life insurance, and be for the benefit of widows, children, relatives, and nominees of the subscribers; that the admission of a nominee by the directors should take place in the life-time of a subscriber; that the capital money forthcoming at a subscriber's death should, subject to certain regulations, be appropriated according to the directions contained in his will, or in any instrument deposited with the directors in the manner prescribed; that the widow's share should not be less than a certain proportion of the money, and that the remainder should be applied, according to the subscriber's directions, for the benefit of his widow, children, blood relations, or nominees who had been duly admitted by the directors; that, if an equivalent provision, as specified, had been made for the widow, the whole money should be subject to the directions of the subscriber in favour of his widow, children, blood relations, or nominees, as aforesaid; that if there was no widow, the whole capital should be subject to the directions of the subscriber as aforesaid; that, if a subscriber died leaving issue and without having directed the application of the capital, it should go to his children and the issue of deceased's children, and, if none, to his next of kin.

(*c*) The scope and design of the contracts entered into with benevolent societies is to enable the subscriber to designate the person for whose benefit the insurance is effected. *Johnston v. Catholic Mutual* (1897) 24 Ont. App. 88, Hagarty, C.J.O.

18. Decisions under the Act.—According to an unreported decision of the Court of Exchequer in 1844, a policy effected under the Act creates a particular species of property, limited as to the persons who were to enjoy it, but to a certain extent subject to the control of the purchaser (*a*). The fund is not the property of the subscriber, who has merely a right to dispose of it in certain ways (*b*). The principle of the Act is to allow the subscriber to dispose absolutely, and as he thinks fit, of two-thirds of the capital if he had a wife and children. If he does not dispose of it, it goes according to the directions contained in his will, that is, it remains his absolute property (*c*). Accordingly, the essence of the engagement entered into with the Directors is that "on certain payments being made by him during his life, he acquires a right to appoint a sum of money on his death, either for the benefit of his widow, if he had one, or if not, of his relatives or nominees, if accepted by the Directors" (*d*). Hence the claims of a subscriber, who dies leaving children but no widow, will prevail against the claims of a stranger in blood who has been named as a legatee in his will, but has not been accepted by the Directors as a nominee prior to the testator's death (*e*). But the relatives who, in default of an appointment or will, would be entitled to the share remaining after the widow of the subscriber has been provided for, are excluded from participation in the fund, where he has, by an instrument that is attested, as required by the rules, and declares the trust irrevocable, instructed the Directors to pay certain persons, and they have been accepted as nominees (*f*).

V. APPLICATION OF THE TRUST FUND AFTER THE SETTLOR'S DEATH.

19. Apportionment of the proceeds where none is specifically made by the settlor.—In a case under the English Act of 1870, in which the policy was for the benefit of a wife and children, Vice-Chancellor Malins at first decided that the money should be

(*a*) *Re Rowsell*, cited in *Attorney-General v. Abdy* (1862) 1 H. & C. 266 (p. 297).

(*b*) *Urquhart v. Butterfield* (1887) 37 Ch. D. (C.A.) 357, affirming on this point S.C. 36, Ch. D. 55.

(*c*) *In re MacLean's Trusts* (1874) L.R. 19 Eq. 274.

(*d*) *Attorney-General v. Abdy* (1862) 1 H. & C. 266, per Bramwell, B. p. 299.

(*e*) *In re Phillips' Insurance* (C.A. 1882) 23 Ch. D. 235, reversing the judgment of Bacon, V.C.

(*f*) *In re MacLean's Trusts* (1874) L.R. 19 Eq. 274.

settled on the widow for life, with remainder to her children (a). On the second hearing, he considered that the provision which requires that the money is to be held "in trust for the wife for her separate use," meant merely that it was to be so held as against her husband, and that, when she became a widow, she might take a part of the capital with the sanction of the Court. The applicant being in poor circumstances, he allowed the policy moneys to be distributed as in case of intestacy. Some years afterwards, Chitty, J., also intimated his opinion that, under such a policy for the benefit of wife and children, the widow took the fund for life, with remainder to her children; but, as the insured in the case was a widower at his death, it was unnecessary to decide the point, and a trustee was appointed to hold for the children as joint tenants (b). The question was again directly presented in *Seyton v. Satterthwaite* (c), and elaborately discussed by North, J., who held that a policy for the benefit of the wife and children of the assured, whether construed independently of or in combination with the Act, amounts to a settlement on the wife and children by creating vested interests as joint tenants in such of them as are living at the settlor's death (d). So far as the children are concerned, it was regarded as immaterial whether they were born before or after the policy was executed.

The ground was taken that either a trust "for the benefit of my wife and our children as joint tenants," or a trust "for the benefit of my wife for life, with remainder to our children," would be equally within the Act, and the learned judge said he could not see how the Act could supply reasons for preferring one construction rather than another. He thought that the fact emphasized by Chitty, J. (*In re Adam's Policy Trusts*, supra), that the benefit to the wife was declared by the Act to be for her "separate use," did not throw any light upon the question, since if these words were added to each of the phrases mentioned, their construction would not be in the least altered.

(a) *In re Mellor's Policy Trusts* (1877) 6 Ch. D. 127; 7 Ch. D. 200.

(b) *In re Adams' Policy Trusts* (1883) 23 Ch. D. 525.

(c) 34 Ch. D. 511. The judgments of Vice-Chancellor Malins were examined and explained, but were thought to have been unsatisfactorily reported.

(d) Compare the ruling with that under a will providing that all the testators' real and personal estate should go to his wife "for the use and benefit of herself and all my children" the wife and children took as joint tenants. *Newell v. Newell* (1872) 7 Ch. App. 253, rev'g 12 Eq. 432.

In a still later case (e) this decision was acquiesced in by Chitty, J, who retracted the opinion for which, as noted above, he had expressed a preference.

In *Ontario* by R.S.O. 1887, c. 136, sec. 7(1), and R.S.O. 1897, c. 203, sec. 159 (7), it is expressly provided that, in the absence of a specific apportionment of the fund among the beneficiaries, they take in equal shares. To the same effect is the legislation in *British Columbia*: Rev. Stat. 1897, c. 104, sec. 9; in *New Brunswick*: 58 Vict., c. 25, sec. 8; in *Quebec*: 41-42 Vict., c. 13, sec. 9; Civ. Code, sec. 5587; in *Manitoba*: Rev. Stat. 1891, c. 88, sec. 10.

20. The interest of each beneficiary in the trust fund is several, and each one may sue the company for his share of the money without joining the other beneficiaries as parties (a).

21. Beneficiary's interest in the fund contingent merely—It was held in a leading Ontario case that, during the lifetime of the assured, the beneficiary of a policy taken out under sec. 4 of the Canadian Act of 1865, c. 17, had no interest to bequeath, and that, if he died before the assured, a child whom he declared his legatee had no claim upon the fund either as against the creditors of the assured or against those who are entitled to his personal estate in case of intestacy (a). The contention of the plaintiff, the daughter of the beneficiary named, was that the case was to be considered as if an insurance had been effected by the father and assigned to or for the benefit of his daughter, thereby giving her a vested interest. But the court rejected this view, holding that her interest was contingent upon her surviving the assured. Osler, J.A., said:

(e) *In re Davies' Policy Trusts* [1892] 1 Ch. 90.

(a) *Campbell v. National Life &c. Co.* (1873) 34 U.C.Q.B. 35. See however *Seyton v. Satterthwaite*, cited in the last section.

(a) *Wicksteed v. Munro* (1885) 10 Ont. R. 283, affirmed (1886) 13 Ont. App. 486. The contract here was in substance to pay the daughter of the assured the specified sum within a certain time after the death of the assured. She died before her father, leaving a child to whom she bequeathed her interest. Prior to her marriage her father married a second time, and died intestate leaving a widow and one child, and without making any other disposition of the policy. Held, that the widow was entitled to the policy money. Ferguson, J., in the lower court also thought that the meaning of the section under review was that a child, in order to take the benefit must survive the insured whether he or she was named in the policy or not. But this point was not discussed by the Court of Appeal. The effect of this case, according to McLennan, J.A., was that a declaration under the Act in favour of wife or child was not a complete disposition of the policy, and that there was a contingent reversion in the settlor, in the event of his surviving the wife or child. *Fisher v. Fisher* (1898) 25 Ont. App. 108 (p. 116).

"It is manifest that any other construction would go far to defeat the object of the Act, which, I take it, was to make up for the individuals or classes specified in the first section a provision at the death of the insured. It can have been no part of the design of the legislature to enable a man to vest in his wife and children property which they could dispose of and release during his lifetime, and which, though inaccessible to his creditors, would thus, during his lifetime, be available to theirs. The class of persons for whose benefit the insurance may be effected is strictly defined, but if they acquire interests transmissible during the insured's lifetime, he may continue to withdraw his property from his creditors for the benefit of his grandchildren, or other persons not within the Act." The learned judge thought that his construction was supported by the language of sec. 4, as it is provided that, where no appointment is made by the insured in the policy, all parties interested in the insurance shall be held to share equally therein—a phrase which could scarcely embrace the children, devisees, or other representatives of the beneficiaries—and that, where the insurance is for the benefit of children generally, without specifying the names, the word "children" shall mean all the children of the insured living at the time of his death.

Burton, J.A., said: "The provisions of this statute interfere to a great extent with the rights of creditors, and look to a provision for the widow and children of the assured, so secured as to be not only free from his control, but also from the claims of his creditors. . . . I am not at all disputing that he could have assigned the policy absolutely to her (the designated beneficiary), or have provided in the event of her death for its going over for the benefit of other parties named, but what we are dealing with is a policy under this statute, and I think its object and intent were to enable the husband or father to interfere to a certain extent with the rights of creditors so as to make provision either for the wife or children or both, to take effect after the death of the assured; and that this object would be defeated if the wife or child could assign their interest in the policy as an ordinary chose in action, and it would open the door to the practising of frauds by enabling the beneficiary to assign the policies and pay over the proceeds to the assured, thus abstracting, it may be, large sums from the creditors and defeating the object the legislature had in view, when permitting the money to be used for this humane object."

In a later case, the effect of this ruling was considered by Rose, J., with reference to the provisions in secs. 5, 6, of R.S.O. 1887, c. 136, in a case where the beneficiary had survived the assured. The conclusion he arrived at was that, although the interest of a wife in a policy was her separate estate, and might be disposed of by her without her husband's consent, the assignee would in such a case take subject to the possible exercise of the powers conferred by sec. 6 of the Act (see III, ante). The fact that

sec. 7 provided a mode by which a husband and wife could assign a policy, after which the powers conferred by sec. 6 could not subsequently be exercised, did not imply that the wife may not assign her interest otherwise than under that section (b).

Under sec. 5604 of the Quebec Civil Code, declaring the policies effected under the statute are not assignable either by the insured or the beneficiary, a wife for whose benefit her husband's life has been insured is entitled to claim the insurance money at his death in spite of her having made an assignment of her interests during his lifetime (a).

22. "Legal heirs," who are.—Under a certificate payable to the "legal heirs" of a member of a benevolent society, who has married twice, leaving two children by his first wife, these take the money to the exclusion of the second wife who survives him (a).

23. Return of premiums to beneficiary found not to be entitled to the insurance moneys.—Where the assured makes a fresh designation of beneficiary which is invalid as against the prior beneficiary, any premiums paid by the second beneficiary after the alteration must be refunded to him when the proceeds of the policy are paid to the party entitled thereto (a).

24. Application of the proceeds where the assured person is murdered by the beneficiary.—In the recent case of *Cleaver v. Mutual &c., Association* (a), the defence to an action by the executors of Mr. Maybrick, who was murdered by his wife, the beneficiary of a policy effected with the defendants, was that public policy forbade the maintenance of an action under such circumstances. The Court of Appeal, while fully recognizing the general principle that "no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person," (Fry,

(b) *Graham v. Canada &c. Co.* (1894) 24 Ont. R. 607. *Wicksteed v. Munro* was distinguished on the ground that the beneficiary there had predeceased the assured.

(a) *Cusson v. Faucher* (1892) 3 Que. Off. (S.C.) 265.

(a) *Mearns v. Ancient Order of U. W.* (1892) 24 Ont. R. 34, the opinion being expressed that there was nothing inconsistent with this view in the provisions of Rev. Stat. Ont., ch. 136.

(a) *Fisher v. Fisher* (1898) 25 Ont. App. 108.

(a) [1892] 1 Q.B. 147.

L.J.), declared that it only constituted a bar to the recovery of the insurance money by the guilty beneficiary herself or anyone who claimed through her. The true legal situation, therefore, was that the trust had by the act of the cestui que trust become incapable of enforcement, the consequence being that, both under the general principles of equity jurisprudence, and by implication from the Act of 1870 (see sec. 6, ante), which provided that the moneys payable under it, should not, so long as any object of the trust remained unperformed, form part of the estate of the insured, a resulting trust as to the insurance money arose in favour of his estate. Whatever rights the children, whom the executors represented, had in the money, were derived from their father, not from their mother, and not in any way affected by her crime.

"The crime of one person may prevent that person from the assertion of what would otherwise be a right, and may accelerate or beneficially affect the rights of third persons, but can never prejudice or injuriously affect those rights. In my opinion, therefore, public policy prevents Florence Maybrick from asserting any title as cestui qui trust to this fund, and thereby brings into operation the resulting trust in favour of the estate of the insured, and so enables the executors to maintain an action as plaintiffs without any taint derived from the crime committed by Florence Maybrick." (Fry, L.J.). "The effect of the section of the Act is to create a resulting trust in favour of the husband's estate which takes effect when, by reason of the crime of the wife, the trust in her favour becomes incapable of being performed in consequence of the rule of public policy." (Lopes, L.J.).

25. Right of appointment, how far within the Succession Duty Act.—A testamentary gift of the sum over which a subscriber to the fund obtains a power of appointment for the benefit of his relatives, or his nominees', if approved by the directors, is a disposition of property, by reason whereof a person has become beneficially entitled to property upon the death of another person, so as to confer a succession within the meaning of the English Succession Duty Act of 1854 (a). On the other hand, where there has been an absolute assignment or mortgage of that sum during the

(a) *Attorney-General v. Abdy* (1862) 1 H. & C. 266; [ruling as to the Customs' Annuity Fund: See IV., ante]. The 17th section of the Act declared that "any disposition or devolution of moneys payable under such [a life insurance] policy, if otherwise such as in itself to create a succession, shall be deemed to confer a succession." The court held that the transaction under review did not differ from a case of an ordinary insurance policy, although only a part of the fund was supplied by the subscriber, and he had only a limited power of appointment over the sum assured.

subscribers' lifetime, the assignees are not liable for the succession duty (*b*).

VI. FIDUCIARY CONTROL OF THE TRUST FUND AFTER THE SETTLOR'S DEATH.

26. Generally.—Under the ordinary principles of equity jurisprudence it is clear that the fact of a settlement's being made under a statute which, like the English Married Women's Property Act of 1870, (See sec. 6, ante), contains no express provision as to the appointment of trustees of the policy moneys, will not preclude an arrangement by which these moneys are to be subject for a specified period to the control of a trustee, instead of being paid over to the beneficiary himself. That such an arrangement is also valid under the English Customs Annuity Act (sec. 14, 15, ante), which is also without any such provision, is now a well established doctrine in England, the only requirement being that the nominee should be duly accepted by the directors as the rules provide (*a*).

Provision respecting the appointment of trustees of the policy moneys by the insured have now been enacted in all the jurisdictions with which we are concerned.

England : Married Women's Property Act 1882, sec. 11.

Nova Scotia : Rev. Stat. 1884, c. 94, sec. 12.

Newfoundland : Consol. Stat. 1892, c. 81, sec. 11.

Ontario : Rev. Stat. Ont. 1897, c. 203, sec. 155, (embodying the similar provisions of the earlier Acts).

New Brunswick : 58 Vict., c. 25, sec. 12.

British Columbia : Rev. Stat. 1897, c. 104, sec. 15.

Quebec : 41-42 Vict., c. 13, sec. 16 (Crim. Code sec. 5594).

Manitoba : Rev. Stat. 1891, c. 88, sec. 16.

(*b*) *In re MacLean's Trusts* (1874) L.R. 19 Eq. 274.

(*a*) *In re MacLean's Trusts* (1874) L.R. 19 Eq. 274; *Urquhart v. Butterfield* (1887) 37 Ch. D. (C.A.) 357; rev'g S.C. 36 Ch. D. 55. In the latter case a subscriber, before he became insane, made a will, while in Scotland, giving his property to a certain legatee, but made no allusion to his interest in the fund. A curator appointed by the Scotch Court of Session procured from it an order appointing him nominee of the subscriber's interest in the fund "for behalf of the legatees under his will," and the directors admitted him in these terms, and afterwards received several annual payments from the lunatic's estate. In the course of the case it was admitted by the directors that this order had the same effect as if the subscriber, being sane, had made the nomination. Held, that the order was a sufficient nomination, and the directors could not refuse to hand over the fund to the curator, as there was a sufficient direction by an instrument, submitted to and approved by them, declaring how the application was to be made.

The provision in the English Act has been held not to be retrospective, this conclusion being based both upon the language used in the section itself and also upon the consideration that a prospective operation could not be ascribed to the provision consistently with the terms of sec. 22 of the Act, declaring that it should not affect any act done or right acquired under the Act of 1870 (*b*). Hence if no trustee has been appointed under a policy taken out prior to its enactment, the result is, not that the policy will vest in the insured and his legal personal representatives, but that upon application to the court a trustee will be appointed, excluding the husband and any person claiming under him from any control over the policy money (*c*).

Where there is no nomination of any trustee under this Act, the insertion of the name of the wife in a policy for her benefit will not be treated as the nomination of her as trustee for herself. The provision framed to meet that contingency takes effect and vests the policy in the assured and his personal representatives (*d*).

27. Security when required from trustees.—Construing the Ontario Act of 45 Vict., c. 20, (R.S.O. 1887, c. 136), sec. 12, the courts have held that a trustee appointed by the court, in default of a designation in the will of the assured, must give security (*a*), and that the clause relating to the payment of the insurance money to a guardian, contemplates a guardian who has given security, and therefore does not justify payment to a testamentary guardian (*b*), but that money payable to infants may, where no trustee or guardian has been appointed, be paid to the executors of the insured without security being given by them (*c*).

(*b*) *Turnbull v. Turnbull* [1897] 2 Ch. 415.

(*c*) *Turnbull v. Turnbull* [1897] 2 Ch. 415, following *In re Adam's Policy Trusts* (1883) 23 Ch. D. 525; 48 L.T.N.S. 727, (see the latter report more especially), where it was held that a petition by a widow to enforce a trust under a policy taken out in 1874, and expressed to be for her benefit under the Married Women's Property Act of 1870 is properly entitled only in the matter of the Act of 1870, and need not be entitled also in the matter of the Act of 1882, and disapproving *In re Soutar's Policy Trust* (1884) 26 Ch. D. 236. To the same effect see *In re Kuyper's Policy Trusts* (1899) 1 Ch. 38.

(*d*) *Cleaver v. Mutual &c. Assoc'n.* (1892) 1 Q.B. 147, per Fry, L.J., (p. 157). As to the disposition of the policy money where the policy provides that it shall be payable as directed by the will of the insured, and the executors appointed by the will renounce, see *Merchants Bank v. Monteith* (1885) 10 P.R. 588.

(*a*) *Re Thin* (1884) 10 P.R. 490.

(*b*) *Campbell v. Dunn* (1892) 22 Ont. R. 98.

(*c*) *Dodds v. Ancient O.U.W.* (1894) 25 Ont. R. 570.

This provision now appears in sec. 155 (2) of the Act of 60 Vict., c. 36 (R.S.O. 1897, c. 203). Since the passage of this Act it has been held to exclude the application of the ordinary rules of law, so far as they are inconsistent with it. A tutrix appointed in the Province of Quebec is therefore not entitled to receive the shares unless she duly qualifies under the provisions (*d*).

28. Discretion of the trustees as to the disposition of the policy moneys—Under the provisions of R.S.O. 1887, c. 136, ss. 11, 13, it is held that the insured can by his will give directions as to the investment of the fund during minority, but that these directions are not to control the discretion of the lawful custodian of the fund and the beneficiary, in case the income is needed for maintenance and education, or the corpus is needed for advancement (*a*).

29. Designation of executors as payees of the policy moneys, result of.—The only cases, it seems, in which a court would be justified in overriding the explicitly stated desire of a settlor of an ordinary policy of life insurance, that one whom he has chosen as his executor should also act as trustee of the policy moneys, would be those in which he is for some special reason an improper person to administer the trust, as where his duties as executor and as trustee would be to some extent antagonistic. Thus it has been held that, where the insured has undertaken, contrary to the provisions of the statute, to derogate by his will from the vested rights of a beneficiary previously designated, and to bequeath the proceeds of the policy to executors upon certain trusts, the executors will not be allowed to act as trustees of the fund, inasmuch as the trusts under the will are repugnant to the absolute rights of the daughter (*a*).

But it would seem that a second indorsement on an endowment certificate by which it is simply declared that the executors of the insured are to be the payees of the trust fund cannot be construed as an expression of his desire that they are to take as trustees for beneficiaries previously designated. Such an indorsement will be

(*d*) *Re Berryman* (1897) 17 P.R. 573. There are similar provisions in the other provinces, which have adopted the Ontario Act; *British Columbia*; Rev. Stat. 1897 sec. 16 (1); *New Brunswick*; 58 Vict., c. 25, sec. 14.

(*a*) *Campbell v. Dunn* (1892) 22 Ont. R. 98, per Boyd C.

(*a*) *Scott v. Scott* (1890) 20 Ont. R. 313. In this instance the guardian of the beneficiary, her mother, was appointed trustee by Chancellor Boyd. Compare *Campbell v. Dunn*, *supra*.

property then or thereafter to be acquired by the spouses, on the principle of community of goods, and therefore it was not a case of marriage without a settlement as in *Lashley v. Hogg*.

ARBITRATION, AGREEMENT FOR—ACTION, STAYING PROCEEDINGS IN—MASTER AND SERVANT—WRONGFUL DISMISSAL—ARBITRATION ACT, 1889 (52 & 53 VICT., c. 49), s. 4—(R.S.O. c. 62, s. 6).

Parry v. Liverpool Malt Co. (1900) 1 Q.B. 339, was an action brought by the plaintiff to recover damages for an alleged wrongful dismissal from the defendants' employment. The defendants applied under the Arbitration Act to stay the proceedings, on the ground that the parties had agreed to refer the question in difference to arbitration. This contract for employment provided that "every dispute arising in connection with the contract" should be referred to arbitration, pursuant to the arbitration clause in the by-laws of the Liverpool Corn Trade Association. The arbitration clauses in those by-laws provided that "all disputes arising out of transactions connected with the trade" should be referred to arbitrators. And the plaintiff contended that the agreement for arbitration was therefore limited to transactions connected with the trade, and that his claim for damages for wrongful dismissal was not within the agreement; but the Court of Appeal (Lindley, M.R., and Romer, L.J.), in overruling Phillimore, J., who refused the application, decided that the proper construction of the agreement required that, for the words "arising out of transactions connected with the trade" in the by-laws, the words "arising in connection with this agreement" should be substituted. The Court of Appeal also held that the dismissal of the plaintiff did not amount to a refusal on the part of the defendants to arbitrate the question whether such dismissal was wrongful.

LANDLORD AND TENANT—PAROL ACCEPTANCE OF NEW TENANCY—SURRENDER BY OPERATION OF LAW—ESTOPPEL.

Fenn v. Blake (1900) 1 Q.B. 426, was an action of ejectment. The facts were simple: The defendant was tenant of the premises in question from year to year, commencing from 25th March. In December, 1898, being desirous of surrendering his tenancy at an earlier date than the following March, he entered into an oral agreement to surrender the premises at the following June. On the faith of this agreement, the plaintiff sold the premises with a

right of possession in June. The defendant in June refused to give up possession. Channell and Bucknill, JJ., affirmed the judgment of the County Court in favour of the plaintiff, on two grounds—(1) that the acceptance of a new tenancy amounted in law to a surrender of the tenancy from year to year, and (2) that the defendant, having by his conduct induced the plaintiff to sell the premises on the faith that the purchaser would be entitled to possession in June, was now estopped from denying that his tenancy had terminated. An interesting discussion of the principles involved in this case may be found in the recent issues of the *Eng. Law Times Journal*, pp. 458, 510.

SOLICITOR—COSTS BETWEEN PARTY AND PARTY—SOLICITOR EMPLOYED AT A SALARY.

Henderson v. Merthyr Tydfil (1900) 1 Q.B. 434, is a case in which a Divisional Court (Channell and Bucknill, JJ.) arrived at a somewhat different conclusion to that reached by the Ontario Courts in *Jarvis v. The Great-Western Ry. Co.*, 8 C.P. 280, and *Stevenson v. Kingston*, 31 C.P. 333. In this case the defendants, a municipal body, recovered a judgment against the plaintiff for costs of defence. It appeared that the defendants' solicitor was employed by the defendants at a salary of £400 per annum, inter alia, to prosecute and defend all legal proceedings on their behalf, and in addition to his salary the defendants were to pay him all out-of-pocket expenses. On the taxation of the defendants' costs the taxing officer disallowed all costs except actual out-of-pocket expenses. On appeal, this was held to be wrong, the Court (Channell and Bucknill, JJ.) being of opinion that some proportion of the £400—though what proportion they do not attempt to define—was paid in respect of the solicitor's costs, and was properly allowable; and that the onus of showing that the ordinary taxed costs would be more than an indemnity to the defendants was on the plaintiff; and, in the absence of proof to the contrary, the taxing officer should assume that the proper taxable fees was the proportion of the £400 salary properly attributable to this action.

ADMINISTRATION—LACHES—PROCEEDINGS TO COMPEL REFUNDING OF ESTATE, AFTER ADMINISTRATION BY COURT.

Mohan v. Broughton (1900) P. 56, was an action by the plaintiff in the Probate Court to revoke a grant of administration

and to obtain a grant to herself, on the ground that the previous grant had been made to a person who was not really next of kin of the deceased. The case was tried before Barnes, J., and his judgment, dismissing the action (1899) P. 211, was noted ante, vol. 35, p. 674. The Court of Appeal (Lindley, M.R., and Williams and Romer, L.JJ.) held that the action was not maintainable, because the plaintiff's object (viz., to obtain a refund of the estate) might be attained without revoking the letters of administration, by bringing an action for the purpose of following the assets into the hands of the persons who had wrongly received them; and, also, on the ground that the plaintiff was barred by laches and acquiescence, the distribution having taken place after the plaintiff had notice of the proceedings.

REPORTS AND NOTES OF CASES.

Province of Ontario.

HIGH COURT OF JUSTICE.

Boyd, C.]

JACKSON v. GARDINER.

[March 31.

Judgment—Default of defence—Ex parte application—Defence filed after default note—Motion to set aside judgment—Costs—Rules 263, 358, 568.

A statement of defence filed after the pleadings have been noted as closed for default of defence under Rule 263, is irregular, but not a nullity, and should be regarded as evidence of an intention to defend; and where, as now permitted by Rule 568, a motion for judgment upon the statement of claim is made ex parte, and the fact of the defence having been filed is brought to the knowledge of the judge, he should direct notice to be served in order to give the defendant an opportunity to make his defence regular.

In this case, judgment having been granted ex parte, it was ordered that there should be no costs of the defendant's motion for relief under Rule 358, which was granted.

E. Taylour English, for defendant. *J. H. Moss*, for plaintiff.

Meredith, C. J., MacMahon, J.]

[April 2.

YOUNG v. DOMINION CONSTRUCTION CO.

Writ of summons—Substituted service—Foreign corporation—Rules 146, 167—Waiver—Appearance.

The order of BOYD, C., ante 240, setting aside an order for substituted service, was affirmed on appeal.

The Court declined to consider the question whether the defendants had waived proper service by entering a conditional appearance, there having been no evidence before the Chancellor that an appearance had been entered, and he having refused to consider it.

A. M. Lewis, for plaintiff. D'Arcy Tate for defendants.

Province of Manitoba.

QUEEN'S BENCH.

Full Court.]

BLANCHARD v. MUIR.

[March 10.

Statute of Limitations—Transcript of judgment—County Courts Act, R.S.M. c. 33, s. 193—Real Property Limitation Act, R.S.M. c. 89, s. 24.

Held, following *Jay v. Johnstone*, (1893) 1 Q.B. 25, and *McKenzie v. Fletcher*, 11 M.R., 544, that section 24 of the Real Property Limitation Act, R.S.M. c. 89, applies to any judgment whether charged on land or not, and that no proceedings can be taken to enforce a judgment after the lapse of ten years from the date of its recovery ; also that the filing of a transcript of a County Court judgment in the Queen's Bench under section 193 of the County Courts Act, R.S.M. c. 33, since repealed, had not so far the effect of making the same a new judgment as to give a new point of time for the running of the statute.

Although the filing of such transcript made the judgment a judgment of the Queen's Bench, and all proceedings might "be thereupon taken and had as on any other judgment of said last mentioned Court," there was no real further adjudication, as no notice to the debtor was necessary, and, if such a proceeding had the effect of giving a fresh point of departure of the period of limitation, the judgment by being transferred under said statute from one County Court to another might be kept alive for an unlimited

time without the knowledge of the judgment debtor, and the judgment creditor might thereby elude and defeat the provision of the Statute of Limitations.

Elliott, for plaintiff. *Aikins*, Q.C., and *Nason*, for defendant.

Dubuc, J.]

[March 21.

NORTH OF SCOTLAND MORTGAGE CO. v. THOMPSON.

Real Property Act, R.S.M. c. 133, s. 143 — Caveat—Address and description of caveator—Signature of caveat by company—Foreign corporation claiming interest in land.

Petition under the Real Property Act :

Held—1. In case the caveator is an incorporated company, it is sufficient to state the full name of the company, although section 143 of the Real Property Act, R.S.M. c. 133, says that "Every caveat filed with the District Registrar shall state the name and addition of the person by whom or on whose behalf the same is filed." *Shears v. Jacob*, L.R. 1 C.P. 513, and *Woolf v. The City Steamboat Co.*, 7 C.B. 103, referred to.

2. The signature to the caveat, being the name of the company with "O. H. & N. Managers" underneath, without the corporate seal, was sufficient.

3. The petitioners being registered, judgment creditors had a right to claim an estate or interest in the lands in question.

4. It was not necessary for the petitioners, although a foreign corporation, to show that they were authorized to hold real estate in this province; for, unless there is some statute forbidding it, such a corporation is allowed by the comity of nations to come into the province and transact its business, to sue, obtain judgment and enforce the same in the manner provided by law, including proceedings to realize by sale of the lands of a judgment debtor, although it might not be entitled, without legislative authority, to buy or hold lands in the province.

Munson, Q.C., for petitioners. *Stackpoole*, for caveatee.

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NO. 10.

A bill was introduced at the last sittings of the Provincial Legislature of Ontario in reference to that clause of the Municipal Act which requires a seven days' notice to a municipality of an accident as a sine qua non to an action for negligence. As was pointed out in committee seven days is quite too short a time to give. In rural municipalities the time given is one month, which is short enough. The one-week clause was originally introduced at the suggestion, we understand, of the City of Toronto, the reason alleged being that in accidents caused by snow and ice it is necessary to make an immediate inquiry, but, as had to be admitted, to be of any benefit in such cases the notice would have to be given within a few hours. Owing to the matter having come up for discussion as the Municipal Committee was closing its sittings nothing was done. The law will doubtless, however, be amended next year, and certainly should be. At present it is one-sided and frequently works gross injustice.

Another attempted item of legislation was that mortgages should no longer involve personal liability. Those who favour the measure argue in this way:—Those who have passed through land booms have seen how thoughtless even careful business men can become in giving covenants for balance of purchase money, thereby often beggaring themselves as well as causing disastrous complications in various business relations. It is true that the gambling spirit cannot be cured by Act of Parliament but anything that tends to check reckless speculation is in the right direction. The Act as drawn could not become law, but there is a germ of reasonableness and propriety in it, and the principle involved is recognized as sound in some of the States to the south of us, where the practice is to give a mortgage which is merely a charge on the land, and if it is intended that there should be a personal liability in addition a bond is given for that purpose. There is much to commend in this practice. There is a manifest difference between a mortgage given as balance of purchase money and a mortgage to secure a loan. In the latter case there is some

reason for giving a mortgage on all you possess, present and prospective, but in the former it would seem reasonable to let each property bear its own burden. We should like to hear this matter discussed.

SIR JOHN HAWKINS HAGARTY, D.C.L.

On the 27th April last Sir John Hawkins Hagarty, ex-Chief Justice of the Province of Ontario, died at his residence in Toronto, at the ripe old age of 83. Although a man of somewhat delicate constitution he outlived most of his contemporaries, and was the last of the judges who occupied the Bench of this Province in 1857, and not a few of the subsequently appointed judges have preceded him to that bourne from which no traveller returns.

Sir John Hawkins Hagarty was the son of Matthew Hagarty, who formerly held the post of Examiner in His Majesty's Prerogative Court for Ireland. His father was a man of superior education, and from him his gifted son no doubt inherited both his fine literary tastes and also a predilection for the law. Sir John was educated at a private school at Dublin, from which he proceeded to Trinity College, Dublin, in his sixteenth year, but he could have hardly completed much more than one year at that well-known seat of learning when he left Ireland for Canada in 1834. His school education there terminated comparatively early, but he had nevertheless acquired a taste for literature, which was to him a life-long source of delight. On his arrival in Canada he went first to a farm near Bowmanville, but in the following year he reached Toronto, then but lately known as "Muddy little York," and there he continued to reside until his death.

Upon coming to Toronto he began the study of the law in the office of Mr. George Duggan, afterwards Recorder of Toronto, and who ultimately succeeded the Hon. Samuel Bealey Harrison as Judge of the County Court of York. In 1840 the future Chief Justice was called to the Bar of Upper Canada, and very soon attained a conspicuous position in its ranks. On the same day two other men signed the roll of solicitors, both of whom afterwards attained distinction, viz., Zacheus Burnham, for many years the highly-respected County Judge of Ontario, and Samuel Black Freeman, an eminent Queen's Counsel, who practiced in Hamilton.

Among other causes celebres he was concerned in the case of *In re John Anderson*. Among Mr. Hagarty's contemporaries were W. H. Blake, W. B. Richards, J. C. P. Esten, Adam Wilson, P. M. S. Vankoughnet, J. W. Gwynne, J. C. Morrison, and Lewis Wallbridge, all of whom were subsequently elevated to the Bench.

Shortly after commencing practice on his own account Mr. Hagarty formed a partnership with the late Hon. John Crawford, afterwards the Lieutenant-Governor of Ontario, and the firm of Crawford & Hagarty speedily established a large and lucrative business. The firm subsequently became Crawford, Hagarty & Ardagh, by the addition of Mr. W. D. Ardagh, who at the time of his death was County Judge at Winnipeg. At the Bar Mr. Hagarty acquired a high reputation as an acute and learned lawyer with great powers of persuasion before a jury. In 1850 he was created a Queen's Counsel, and in 1855 received the honorary degree of D.C.L. from Trinity College, Toronto.

Mr. Hagarty was appointed to a puisne judgeship in the Common Pleas on February 3rd, 1856. Sir W. H. Draper was created Chief Justice of that Court, the late Sir W. B. Richards being its other member. In that position Mr. Hagarty continued until 1863 when he was transferred to the Queen's Bench. In 1868 he went back to the Pleas as its Chief, and ten years later he went back to the Queen's Bench as Chief Justice. There he remained until 1884 when he succeeded the late John Godfrey Spragge as the Chief Justice of the Province and President of the Court of Appeal. This exalted position he held until 5th April, 1897, with entire satisfaction to his colleagues, the profession and the public, thus completing a judicial career of rather more than forty-one years.

After his retirement from the Bench a large and highly representative meeting of the Bench and Bar of the Province was held at Osgoode Hall, in June, 1897, at which an address expressive of the admiration and respect of all the members of the profession was presented to the late Chief Justice. (See 33 C.L.J., 476.) On the 28th September following Her Majesty was pleased to confer on him the dignity of a knight of the United Kingdom.

To say that he was a man of polished and ready wit does not express the brilliancy of many of the bon mots and clean cut but withal good natured sallies with which he often relieved the dull monotony of a prosy argument. With an even temper and genial

cheery manner was combined the courtesy of a gentleman of the old school.' He was a sound and well read lawyer with a keen mind, rapidly grasping the salient points of a case, and quick to detect a fallacy.

Strongly conservative in his views he took no pleasure in change or modern freaks, legislative or otherwise, and cared not for the fusion of law and equity, preferring to the last the ways of the common law, in the law and practice of which he was an adept. As is well known he had a cultivated taste in general literature, and it is said of him, what can be said of few others, that he had read all the books in his large and carefully selected library, and to a remarkable extent he remembered what he read. In his leisure moments the late Chief Justice amused himself and delighted his friends by writing several short poems of no ordinary merit which should be collected and published, and we hope this may be done.

His career was the result of sterling ability and not due to politics or extraneous causes, for he sought no honors, but was on the contrary a modest, retiring man, who always deprecated being thrust into notoriety. His memory will be cherished by the profession as the memory of an able, conscientious and learned judge ever deserves to be, and he linked us to the best traditions of the Bench and Bar of old Upper Canada. To his large circle of private friends he was all that the profession recognized in him and much more, for they will have to mourn not only the loss of the public man, but also the kind friend whose wit and fancy and warm sympathies so often brightened the hours of social intercourse. He was above all a God-fearing man and a sincere Christian, his religion finding its chief utterance not so much in words as in quiet deeds of charity. He has gone to his rest, leaving the record of a well-spent life.

OUTRAGE ON THE WELLAND CANAL.

From whatever point of view the recent attempt upon the Welland Canal may be regarded, the matter is a serious one, and, in its consequences, may be more serious still. Whatever the motive which prompted the action, from whatever source the funds required to carry it out were obtained, whatever association, social, political or commercial was concerned in it, the facts must be ascertained, and the actors made to pay the penalty due to a crime

so atrocious. And not only the facts, but the secret springs and motives which led to the crime, and the ultimate effects which were intended, must be laid bare. And when this is done the people of this country, and of the Empire at large, will be more than justified in asking for some better protection than international law now seems to afford against the repetition of conduct of which this is not a solitary instance.

The evidence so far discloses nothing as to the motives of the criminals, or the objects of the crime. One thing indeed is clearly ascertained—the outrage was planned in American territory, and its perpetrators, so far as known, are American citizens. It is significant of the temper in which the men arrested were acting that the one who appeared to be the leader of the gang declared himself an American citizen, and impudently demanded that, on that account, the ordinary rules of procedure in criminal investigations should be set aside on his behalf.

Awaiting further developments, we may now consider the only two suggestions which are put forward as to the motives which inspired the outrage, and the objects to be promoted. Of these the one is that the object was commercial, the other that it was political. We are, in the first case, asked to believe that either an industrial association, or a company of business men engaged in the forwarding trade, and both dependent upon maintaining the advantages of Buffalo, and of the Erie Canal, over the St. Lawrence route, had determined to wreck the Welland Canal as a necessary link in that route, regardless of all moral considerations, all international obligations, and of the destruction of private as well as public property, and the almost certain loss of human life, which the success of the attempt would have brought about. We know, it is true, something of the lengths to which commercial companies, or combinations will go in order to crush rival enterprises, or secure greater profits. We know also too much of the cruel methods which industrial organizations have adopted to accomplish their ends; but nothing so audacious, or so outrageous, as to destroy the public property of a friendly state and in so doing endanger the lives and destroy the dwellings of unoffending workpeople has never yet been laid to the charge of either of these associations. If it should be proved that there is any foundation for such an accusation then indeed a new danger, not only to the public peace, but to the comity of nations, has arisen which

must be dealt with, not only by domestic legislation, but also by international agreement.

If, on the other hand, the object of the outrage was political, we stand on more familiar ground, and are face to face with a danger not less serious because we have had to encounter it before. The nature of the attempt to destroy the canal, its folly and its wickedness; its callous disregard to human life; its audacity in projection, and its uselessness if accomplished; and lastly the clumsy way in which the details were carried out, are strongly suggestive of what we know of Fenian exploits of a similar character. The probability of this suggestion being the correct one is enhanced by the fact of the close sympathy both in Ireland and America between the Fenian and pro-Boer elements. Each of these has striven to involve Great Britain in difficulties with foreign powers of which advantage might be taken either in Ireland or South Africa. An Irish agitator has been the chief speaker at pro-Boer meetings in the United States, and has been the most persistent in denouncing the conduct of the British Government. Why the people of Canada, who have neither act nor part in the government of Ireland, and who indeed have not been wanting in expressions of sympathy for the Irish cause, should be made the victims of Fenian machination has often been a puzzle to the people of this country, but, apparently, animosity to the British Empire is too strong in the Fenian mind for any minor consideration of either justice or reason.

It is, however, with the international aspect of the case rather than with the criminal vagaries of Fenian or Boer agitators that we are concerned. A retrospect of our relations with the United States is not indeed reassuring. Twice has the soil of this country been made the theatre of war with the avowed intention of holding the country by right of conquest, regardless of the wishes of the people. Two boundary disputes have been settled by the sacrifice, for the sake of peace, of our rights, and our interests; and it would appear that the one now pending can only be peacefully settled by a similar sacrifice. When an unauthorized attempt was made during the Crimean war to obtain men in New York for the British army an abject apology had to be made, and for the St. Alban's raid immediate compensation had to be paid, but the Fenian organization was allowed, openly and without hindrance and with the knowledge of the American authorities, to carry on

its preparations for the invasion of Canada, and not till the attempt had been made and failed did those authorities interfere. Yet when a claim for compensation was made for the injury done to this country it was peremptorily refused. The Alabama claims were paid twice over, but hardly an apology was made for the blood shed by American citizens at Ridgeway and Fort Erie.

Coming now to the present time, we find that there is going on in the United States an anti-British agitation of just such a nature as to lead to the commission of outrages akin to that of destroying the Welland canal. All that has been said about the obligation of the United States to Great Britain for her action during the war with Spain is disregarded or forgotten. Not only is Great Britain denounced for an alleged attempt to destroy the independence of the South African Republic, but the people of the United States are told that the existence of Canada, under monarchical institutions, is something that good Americans cannot, and ought not, to tolerate. By the leaders of one of the great parties, intervention in South Africa is demanded, and the feeling in favor of it is said to be so strong that the other party, whatever their convictions may be, dare not oppose it. Upon this overt act of hostility to Great Britain the result of the presidential election is said to depend, and we in Canada are told that we must patiently abide the result of the humors of an irresponsible mob which must be petted and indulged, but not controlled, so as best to suit the interests of the unscrupulous politicians to whom the destinies of the republic are committed.

It would, no doubt, be unreasonable to hold Mr. McKinley and his cabinet responsible for the sayings and doings of Mr. Bourke Cochrane and Mr. Webster Davis, though the latter was lately holding an important office. In fact it is not with a government able to control and answer for the people, such as we find in other parts of the civilized world, that we have to deal, but with an irresponsible mob. What avails it that there is, as we are told, a fraction among the American people who are neither ignorant, nor prejudiced, and upon whose good opinion we can rely. They may have all the good qualities in the world, but they have in fact no voice in the government of the country. They do not to any degree sway the government of the country and are helplessly swamped by the great mass of ignorant and prejudiced voters before whom both political parties abase themselves.

Under these conditions our position is a peculiar and certainly not a satisfactory one. The history of the past gives no guarantee for the future. Will Mr. McKinley be as willing to bow to mob dictation in the matter of intervention in South Africa as Mr. Cleveland was with regard to Venezuela? Will any more strenuous effort be made to check the kind of agitation which bears fruit in the destruction of our canals, than was made to prevent the Fenian invasion of 1866? Time will tell. In the meantime as appeals to international law and custom appear to be useless, the authorities had better look to the defence of our frontier. With a slight inversion the maxim *Inter arma leges silentur* might seem to apply.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act.)

ADMINISTRATION—DE BONIS NON—GRANT OF ADMINISTRATION TO BENEFICIARY IN RESPECT OF PROPERTY IN WHICH LEGAL ESTATE OUTSTANDING.

In the Goods of Agnese (1900) P. 60, was an application by a trustee in bankruptcy for a grant of administration de bonis non to the estate of one Agnese, who had died legally entitled to certain shares in foreign railway companies, the beneficial interest in which formed part of the bankrupt's estate. Agnese had died intestate, and administration had been granted to his estate, but the administrator had died, leaving part of the estate unadministered. Jeune, P.P.D., granted the application, limiting the grant to the shares in question.

EVIDENCE—FOREIGN LAW, PROOF OF—COLONIAL MARRIAGE.

In *Cooper-King v. Cooper-King* (1900) P. 65, the only question determined is a point of evidence. It became necessary to prove the validity of a marriage celebrated in Hong-Kong. It was stated on behalf of the petitioner that the only legal expert evidence available to give evidence of the marriage being valid according to the law of Hong-Kong demanded a prohibitive fee,

and the Court, therefore, gave the petitioner leave to prove the marriage by an affidavit of an ex-Governor of the colony, who, although not a member of the legal profession, deposed that he was conversant with the laws and ordinances in force in the colony.

SPECIFIC PERFORMANCE—VENDOR AND PURCHASER—PROPERTY USED AS A DISORDERLY HOUSE AT TIME OF SALE.

Hope v Walter (1900) 1 Ch. 257, is an instance of the way in which the Court acts in granting or refusing specific performance of a contract for the sale of land. In the present case the property was described in the particulars of sale as 'an eligible freehold.' After the contract had been made, the purchaser discovered that the property was being used by the tenant in possession as a disorderly house. Neither party before the sale knew of this, and the tenant was guilty of a breach of an express covenant in so using the premises. Cozens-Hardy, J., thinking the case governed by *Lucas v. James* (1849) 7 Hare, 410, thought the vendor entitled to specific performance, (1899) 1 Ch. 879, (see ante, vol. 35, p. 668); but the Court of Appeal (Lindley, M.R., and Williams and Romer, L.JJ.) have reversed his decision, because under the Criminal Law Amendment Act, 1885 (48 & 49 Vict., c. 69), s. 13 (3), which does not appear to have been adopted in Canada, a lessor becomes criminally liable if he knowingly permits the demised premises to be used by his tenant as a brothel. In *Lucas v. James* the objection of the purchaser was that there was a disorderly house near the property which was the subject of the contract, and that was held to be no ground for refusing the vendor specific performance, and, without saying whether that decision was right or wrong, the Court of Appeal considered it did not cover the facts of the present case. It might be a question in Ontario how far *Hope v. Walter* would be binding, having regard to the decision being based on the statute above referred to; but notwithstanding that no criminal liability might attach to a purchaser, it might be still held that it would be, to use the language of the Master of the Rolls, "contrary to those principles of justice and fairness by which this Court is always guided in exercising that extraordinary jurisdiction," to compel a purchaser specifically to perform a contract under such circumstances.

CONFLICT OF LAWS—CONTRACT—LEX LOCI CONTRACTUS—LOCUS SOLUTIONIS
—CONTRACT TO BE PERFORMED IN DIFFERENT COUNTRIES.

South African Breweries v. King (1900) 1 Ch. 273, turns upon the question by what law the contract in question in the action was to be governed. It was made in writing at Johannesburg in the South African Republic by the plaintiff company's predecessors in title, a company which had its head office in London, England, but carried on business in South Africa, the other party to the contract being the defendant, a British subject, resident at Johannesburg. By the contract the defendant agreed to serve the company as a brewer or otherwise in its business carried on in Johannesburg, or in the Colony of Natal, or elsewhere in South Africa, and provision was therein made for the defendant's residence in Johannesburg; the contract was in English form and in the English language. Kekewich, J, decided (1899) 2 Ch. 173 (noted ante, vol. 35, p. 760) that the law of the South African Republic governed the contract, and the Court of Appeal (Lindley, M.R., and Williams and Romer, L.JJ.) have affirmed his decision.

HIGHWAY—OBSTRUCTION OF HIGHWAY—REASONABLE USER—INJUNCTION.

Attorney-General v. Brighton & Hove Co-Operative Association (1900) 1 Ch. 276, is a case which, in these days of co-operative and departmental stores, may possibly excite some interest. The action was in the nature of an information brought to restrain the defendants, a large co-operative association, from obstructing a highway. The facts were: That for the purpose of carrying on their business the defendants were accustomed to keep as many as six vans during every alternate hour of the day, loading and unloading goods at their premises, the roadway in which the vans stood being less than 20 feet, and the vans occupied about half its width, thus causing a serious obstruction to the passage of other vehicles through the street. Kekewich, J., granted a perpetual injunction against the defendants, restraining them from "wilfully" obstructing the road by excessive and unreasonable user, from which the defendants appealed; but the Court of Appeal (Lindley, M.R., and Williams and Romer, L.JJ.) held that the decision was right, though they struck out the word "wilfully." Romer, L.J., lays it down that the question of reasonable user is necessarily one of degree, and that it does not at all follow,

because a man's user of a highway is necessary for carrying on his business, that it is therefore reasonable having regard to the rights of others to the use of the highway.

WILL—CONSTRUCTION—HOTCHPOT CLAUSE—REAL PROPERTY LIMITATION ACT—RENT DUE TO TESTATRIX IN RESPECT OF PROPERTY OF WHICH CHILD ACQUIRES POSSESSORY TITLE.

In re Jolly, Gathercole v. Norfolk (1900) 1 Ch. 292, a hotchpot clause in a will was under consideration. The testatrix gave her property among her four children, and directed that all moneys owing to her at her death by any child for rent or otherwise should be brought into hotchpot in ascertaining the share of such child. One son had been let into the possession of a farm by the testatrix in 1868. He paid rent to 1881, when he ceased to pay rent and acquired a title by possession as against the testatrix, who died in 1899. On making a division of the estate, it was claimed on behalf of the other children that the son must bring into hotchpot rent for the farm for a period of twelve years between 1881 and 1893, when the testatrix's title was extinguished under the Real Property Limitation Act. The son contended that the extinguishment of the title was equivalent to a conveyance, and that the rent as incident to the reversion became vested in him, and, there being no covenant to pay rent, the rent had ceased to be a debt due to the testatrix. North, J., however, held that although the title of the testatrix was extinguished, yet that the title so acquired did not confer the same rights as are acquired by conveyance, and that the rent in arrear remained a debt due to the testatrix, and, as such, was properly within the hotchpot clause of her will.

COMPANY—ARTICLES OF ASSOCIATION PURPORTING TO DEPRIVE SHAREHOLDERS OF STATUTORY PRIVILEGE.

Payne v. The Cork Co. (1900) 1 Ch. 308, may be briefly noted here for the fact that Stirling, J., decides that articles of association of a limited company which purport to deprive shareholders of a privilege conferred on them by statute are inoperative. The statute in question in this case was one which entitled shareholders who objected to a sale of the undertaking of the company, of which they were shareholders, to any new company, to be paid the value of their shares, instead of accepting shares in such new company. This privilege, it is held, cannot be taken away by articles of association.

HUSBAND AND WIFE—MARRIAGE CONTRACT—PROMISE BY WIFE'S FATHER TO LEAVE HER "A SHARE" OF HIS ESTATE—SPECIFIC PERFORMANCE.

In re Fickus, Farina v. Fickus (1900) 1 Ch. 331, was an action by husband and wife against the executors of the wife's deceased father's estate for the specific performance of a promise made by the wife's father prior to the plaintiffs' marriage to leave her "a share" of his estate. The promise was made in a letter to the intended bridegroom, in which the father, referring to his daughter, said: "She will have a share of what I have after the death of her mother," &c. After the marriage, the father had acquired a fortune of £100,000, but had only left the female plaintiff a legacy of £2,000. Cozens-Hardy, J., who tried the case, was of opinion that the statement in the letter did not amount to a contract, but was a mere expression of intention, and that on that ground the plaintiffs could not succeed; but even assuming it did amount to a contract, that the legacy of £2,000 satisfied the obligation. The action was, therefore, dismissed with costs.

BILL OF SALE—INTEREST ON DEBT AFTER SALE OF PROPERTY.

In *West v. Diprose* (1900) 1 Ch. 337, the plaintiff had given the defendant a bill of sale of chattels as security for a loan of £500 and interest thereon at the rate of £60 per cent. per annum, the principal to be repaid by monthly instalments. One monthly instalment only was paid, when the parties entered into an agreement that the mortgaged property should be sold, and the loan paid out of the proceeds. The sale having been made, the defendant claimed to hold the purchase-money and apply it in payment of his principal and interest as it fell due, according to the proviso for repayment, to which the plaintiff not unreasonably objected, and contended that he was only entitled to his principal and interest up to the date of sale. Cozens-Hardy, J., held that the defendant, having elected to proceed on the plaintiff's authority to sell the goods and apply the proceeds in payment of the debt, was bound to carry out the direction, and that from the moment the money was received interest ceased to run. This is another case which reveals the utterly unconscionable ways of some money-lenders. The wretch Gordon, referred to in a former note, we see has gone to his account, followed by a chorus of execration.

Correspondence.

PROFESSIONAL COSTUME.

To the Editor of the CANADA LAW JOURNAL :

Sir,—In a recent issue there appears a very excellent portrait of Mr. Matthew Wilson, Q.C. Without the explanation that was given one would have been puzzled to understand the meaning of the head gear. At the first glance it seems rather anomalous that in British Columbia only of all the provinces the wig is part of the barrister's costume, but that province has always been particularly English and has in matters pertaining to the courts carefully followed English practice. But after all would it not be rather an advantage in this province to adopt the wig? A good many learned counsel are not overburdened with hair on the top of their heads and would be rather improved by the addition of such a wig as counsel wear when appearing before the Privy Council. Then too, the wearing of wigs by the judge would increase the dignified appearance and uniformity of their lordships and possibly they might not be averse to such a covering. It would be interesting to know what the bar generally think about this.

Yours, etc.,

Pl.

[Whilst everything that tends to add dignity and solemnity to matters pertaining to the administration of justice should be encouraged, it would seem rather late at the end of the nineteenth century to suggest a change in the direction indicated. It may have been that from a utilitarian point of view a wig was desirable in former days to protect bald heads on the bench or at the bar from draughts, but in these days and in modern court houses even that reason for their use would not be of importance.—Ed. C.L.J.]

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

N.S.]

HART v. McMULLEN.

[April 2.

Easement—Sale of land—Severance of possession—Right of purchaser to easements.

The owner of two adjacent properties conveyed them to different parties. One of the purchasers erected a dam on his land in the use of which he caused the water collected to flow back on the other property which was on a higher level. In an action claiming damages for this injury, there was evidence that the former owner had also had a dam on the land but it had been abandoned years before, and was not in use at the time of the conveyance.

Held, affirming the judgment of the Supreme Court of Nova Scotia, 32 N.S.R. 340, that where two properties of one owner are sold at the same time, and each of the purchasers has notice of the sale to the other, any continuing easement passes with the sale, but the same must have been substantially enjoyed by the vendor at the time of the sale. Therefore, as the right to use the dam in this case did not exist when the conveyance was made it could not be claimed by the purchaser. Appeal dismissed with costs.

Borden, Q.C., and Harris, Q.C., for appellant. Drysdale, Q.C., and Layton, for respondent.

N.S.]

WALKER v. FOSTER.

[April 2.

Donatio mortis causa—Evidence of delivery—Delivery to third person.

W., wishing to dispose of his property after death without making a will, placed certain promissory notes in envelopes addressed to each of his children and kept them for some years in a desk in his bedroom. When on his deathbed, he delivered the keys of the desk to one D., instructing him to deliver after his death the envelopes to his children as addressed. The contents of the respective envelopes were shown to D. and then the envelopes were sealed up in his presence. They were delivered by D. as directed. In an action by the administrators of deceased's estate to recover from one of the children damages for the conversion or detention of the property so delivered to him,

Held, reversing the judgment of the Supreme Court of Nova Scotia, 32 N.S.R. 156, that D. was not the agent of the donor in the matter, but received the property for the benefit of the donee; that it was not material

that the donee neither assented to the gift nor knew of it ; that the property itself was delivered to D., but if only the key had been delivered, it would have been sufficient to effect a donatio mortis causa. Appeal allowed with costs.

Roscoe, Q.C., for appellant. *J. J. Ritchie*, Q.C., for respondents.

N.S.] HALIFAX ELECTRIC TRAMWAY CO. v. INGLIS. [April 2.

Negligence—Electric car—Excessive speed—Prompt Action—Contributory negligence.

A cab driver was endeavoring to drive his cab across the track of an electric railway when it was struck by a car and damaged. In an action against the Tramway Co. for damages, it appeared that the accident occurred on part of a down grade several hundred feet long, and that the motorman after seeing the cab tried to stop the car with the brakes, and that proving ineffectual, reversed the power, being then about a car length from the cab. The jury found that the car was running at too high a rate of speed, and that there was also negligence in the failure to reverse the current in time to avert the accident ; that the driver was negligent in not looking more sharply for the car ; and that notwithstanding such negligence on the part of the driver, the accident could have been averted by the exercise of reasonable care.

Held, affirming the judgment of the Supreme Court of Nova Scotia, 32 N.S. Rep. 117, that the last finding neutralized the effect of that of contributory negligence ; that as the car was on a down grade and going at an excessive rate of speed, it was incumbent upon the servants of the company to exercise a very high degree of skill and care in order to control it if danger was threatened to anyone on the highway ; and that from the evidence given it was impossible to say that everything was done that reasonably should have been done to prevent damage from the excessive speed at which the car was being run. Appeal dismissed with costs.

Harrington, Q.C., and *Covert*, for appellant. *Borden*, Q.C., for respondent.

Que.] ASBESTOS & ASBESTIC CO. v. DURAND. [April 2.

Negligence—Use of dangerous materials—Cause of accident—Arts. 1053, 1056 C.C.—Employer's liability.

To permit an unnecessary quantity of dynamite to accumulate in dangerous proximity to employees of a mining company in a situation where opportunity for damage might occur from the nature of the substance or through carelessness or otherwise, is such negligence on the part of the company as will render it liable in damages for the death of an employee from an explosion of the dynamite, though the direct cause of such explosion may be unknown. GWYNNE, J., dissenting.

Held, further, that as the doctrine of common employment does not prevail in the Province of Quebec, acts or omissions by fellow servants of the deceased could not exonerate the employes from liability for the negligence of a servant which may have led to the injury. *The Queen v. Filion*, 24 S.C.R. 482, and *The Queen v. Grenier*, 30 S.C.R. 42, followed. Appeal dismissed with costs.

Laflamme, for appellant. *L. C. Belanger*, Q.C., for respondent.

Province of Ontario.

COURT OF APPEAL.

From Divisional Court.]

[Sept. 12, 1899.

IN RE GLEN. FLEMING *v.* CURRY.

Local Master—Resignation—Concurrent appointments.

While an appeal from his report was pending, a local master sent a letter of resignation to the Attorney-General's Department, and, without any acceptance of this resignation, a commission was issued appointing another gentleman "a local master" for the county in question. Subsequently the appeal was allowed and the report was referred back to "the master" for the county:—

Held, that there could not be two local masters; that the action of the Executive was equivalent to an acceptance of the resignation; and that the reference must proceed before the new incumbent of the office. Judgment of a Divisional Court affirmed.

S. H. Blake, Q.C., for appellant. *Aylesworth*, Q.C., and *O. E. Fleming*, for respondent.

From Falconbridge, J.] REGINA *v.* ST. CLAIR.

[Jan. 31.

Criminal law—Summary trial—Habeas corpus—Certiorari—Writ of error—Appeal—Evidence—Depositions in other proceedings—Counsel's consent.

A conviction by a magistrate under the sections of the Criminal Code relating to the summary trial of indictable offences may be brought up for review by writs of habeas corpus and certiorari; a conviction under those sections not being matter of record in such sense as to make it reviewable only by writ of error.

Upon the hearing of a charge under these sections, evidence in other proceedings against another prisoner is admissible upon the consent of the accused's counsel. Judgment of FALCONBRIDGE, J., affirmed.

E. B. Stone, for appellant. *John R. Cartwright*, Q.C., for the Crown.

From Rose, J.] CALDWELL v. TOWN OF GALT. [March 27.

Municipal corporations—Highways—Obstruction—By-Law—Injunction.

In an action to restrain the defendants from enforcing a by-law to compel the plaintiff to remove a verandah projecting some distance over one of the streets of the town, it was held, on the evidence, that the verandah had been built after the street had been dedicated and laid out, and that it was therefore an unlawful obstruction ; but as it had been in existence for a great many years and as no special necessity for its removal was made out, the Court refused to grant the defendants a mandatory injunction against the plaintiff for its removal, leaving them to enforce their by-law in such way as they should be advised. Judgment in 35 C.L.J. 232 varied.

James Bicknell, for appellant. *Du Vernet*, and *Card*, for respondents.

From Divisional Court.] RYAN v. WILLOUGHBY. [March 27.

Contract—Breach—Condition precedent—Inability to perform—Municipal corporations—Resignation of councillor.

The defendant, who was a municipal councillor, entered into a sub-contract with the plaintiff to do the brick and mason work under the plaintiff's contract with the municipality to build a town hall, that contract providing that the contractor should not sub-let the work or any part thereof without the consent in writing of the architect and municipality, and this consent the plaintiff was to obtain. The municipality refused to consent to the sub-contract on the ground that the defendant's services would be of value in the oversight of the contract :—

Held, that there could not be imported into the defendant's sub-contract an agreement to resign his seat, as such an agreement to resign a public trust for private gain would be contrary to public policy and illegal, and that the defendant was not liable in damages because of the breach of an implied obligation to resign, though his resignation might, as the plaintiff contended, have enabled the plaintiff to fulfil the condition precedent on his part of obtaining the municipality's consent. Judgment of a Divisional Court, 30 O.R. 411, reversed.

Watson, Q.C., and *J. A. Allan*, for appellant. *Shepley*, Q.C., for respondent.

From Divisional Court.] [March 27.

McMILLAN v. McMILLAN.

Will—Construction—Inconsistent clauses—Executory devise—Failure of issue.

A testator, by the third clause of his will, devised a lot of land to a son, "his heirs and assigns forever," and in the fourth clause stated it to be

"my will and desire, provided my (said) son shall have no lawful heir or children, that the above mentioned tract of land, after his death, that (the plaintiff) shall have it with all the right and title that my (said) son had to it heretofore." By the fifth clause he gave to his wife "the use" of half the lot, "during life; after her decease my will is that the same shall belong to my (said) son, his heirs and assigns forever." The son died after the testator without having had any children:—

Held, that the fifth clause removed from the operation of the third and fourth clauses one half of the lot which vested in the son subject to the mother's life estate, while as to the other half the son had under the third clause an estate in fee simple subject under the fourth clause to an executory devise over in favour of the plaintiff, which, in the events which had happened, had taken effect. Judgment of a Divisional Court, 35 C.L.J. 445; 30 O.R. 627, affirmed.

R. Smith, for the appellant. *J. H. Moss*, for the respondent.

From Armour, C. J.]

[March 27.

CHOATE v. ONTARIO ROLLING MILLS COMPANY.

Master and servant—Negligence—Dangerous process—Want of warning.

The plaintiff while employed in removing the cut pieces from a pair of shears worked by steam power was struck by a flying piece of metal and severely injured. The machine was perfect of its kind and it was not shown that a screen or guard could have been used, and the plaintiff was aware that there was danger. The danger when steel was being cut was greater than when iron was being cut, and the accident happened when steel was being cut.

Held, that there should have been some warning that steel was about to be cut, and that this means of reducing the possible danger not having been adopted, the defendants were liable in damages as at common law. Judgment of ARMOUR, C.J., affirmed.

Osler, Q.C., and *John Greer*, for appellants. *Tetzels*, Q.C., and *A. M. Lewis*, for respondent.

From Meredith, C.J.]

EWING v. HEWITT.

[March 27.

Nuisance — Highway — Obstruction — Continuing nuisance created by another.

The owner of a house abutting on a highway placed without authority a trap-door in the sidewalk in order to obtain an entrance to his cellar, the hinges of the trap-door projecting about an inch above the sidewalk. The defendant obtained title from this owner and continued to use the trap-door, and the plaintiff, while lawfully using the highway, stumbled against the hinges and was hurt.

Held, that the defendant could not be held to be continuing the nuisance as she had no title to the highway, and no right, strictly speaking, to remove the trap-door constructed by another, and that, as the accident was not caused during or by her user of the trap-door, she was not liable. Judgment of MEREDITH, C.J., ante p. 23, reversed.

Marsh, Q.C., for appellant. *John MacGregor* and *R. G. Smyth*, for respondent.

From Meredith, C.J.]

[March 27.

STRUTHERS *v.* TOWN OF SUDBURY.

Assessment and taxes — Exemptions — “Public hospital” —

R.S.O. c. 224, s. 7 (5).

A hospital carried on by and for the benefit of two medical practitioners, and used chiefly by patients paying fees, though to some extent by indigent patients, and in receipt of a government grant under The Charity Aid Act, R.S.O. c. 320, is a public hospital within the meaning of sub-s. 5 of s. 7 of the Assessment Act, R.S.O. c. 224, and exempt from taxation. Judgment of MEREDITH, C.J., 35 C.L.J. 72 ; 30 O.R. 116, affirmed.

Nesbitt, Q.C., and *J. H. Clary*, for appellants. *Aylesworth*, Q.C., for respondents.

From Armour, C.J.] BREWSTER *v.* HENDERSHOT.

[March 27.

Trust—Church—Possession—Religious Institutions Act—R.S.O. c. 307.

Land was conveyed to certain persons in trust for a religious body called The United Brethren in Christ, and a congregation was organized and a church built. Subsequently a division took place in the religious body and it was held, in *Itter v. Howe* (1896) 23 A.R. 256, that the party to which the congregation in question adhered were seceders. This congregation continued to use the church and, some of the original trustees having died, appointed new trustees to act with the survivors, and these trustees refused to give up possession to the representatives of what had been declared to be the true body :—

Held, that the trustees must be treated as being trustees for the true body, who were entitled to enforce the trust and to have possession of the church, and that it was not necessary to organize another congregation and appoint new trustees for that congregation under The Religious Institutions Act. Judgment of ARMOUR, C.J., 35 C.L.J. 394, reversed.

German, Q.C., for appellants. *Cowper*, for respondents.

From Meredith, C.J.] PEACOCK *v.* COOPER.

[March 27.

Evidence—Negligence—Fire—Sparks from steamer.

In an action to recover the value of buildings destroyed by fire started, as was alleged, by sparks escaping from the detective smokestack of a

steamboat, evidence that on prior and subsequent days sparks of large size escaped from the smokestack may be admissible to prove its defective construction, but opinionative evidence that having regard to the force and direction of the wind on the day in question sparks of this size if they escaped might have been carried to the building in question is too conjectural and speculative. Judgment of MEREDITH, C.J., affirmed.

Matthew Wilson, Q.C., for appellants. *J. S. Fraser*, for respondent.

From Street, J.]

[March 27.

FLOER v. MICHIGAN CENTRAL RAILWAY COMPANY.

Trial—Jury—Failure to agree—Dismissal of action—Rule 780.

When in an action tried with a jury the presiding judge holds that there is evidence to submit to the jury and refuses a nonsuit, he cannot, upon the jury disagreeing, himself decide under Rule 780 in the defendant's favour upon his own view of the evidence. Judgment of STREET, J., 35 C.L.J. 416; 30 O.R. 635, affirmed.

D. W. Saunders, and *J. Montgomery*, for appellants. *F. A. Anglin*, for respondent.

From Street, J.]

[March 27.

HOOD v. COLEMAN PLANING MILL AND LUMBER COMPANY.

Principal and surety—Application of payments—Mechanic's lien.

The plaintiff, who was a director of a company for which the defendants were doing work, endorsed the company's note in the defendants' favour for part of the defendants' claim. The note was discounted by the defendants and was dishonoured and the holders obtained judgment against the plaintiff who did not, however, pay any part of the claim. Subsequently the defendants obtained, in mechanic's lien proceedings instituted by other creditors, a dividend of eighty-one cents on the dollar of their total claim including the portion covered by the note.

Held, that they were not bound to apply the amount received first in satisfaction of the portion of the claim covered by the note, nor entitled to apply it first in satisfaction of the portion of the claim not covered by the note, but were bound to apply it pro rata on the whole claim. Judgment of STREET, J., affirmed.

Washington, Q.C., for appellants. *D'Arcy Tate*, for respondent.

From Street, J.]

SCOTT v. MELADY.

[March 27.

Sale of goods—Statute of frauds—Delivery—Acceptance.

The defendants agreed to buy from the plaintiff ten thousand bushels of No. 2 red wheat, at \$1.12 per bushel, to be delivered f.o.b. a vessel to be provided by the defendants, who were to pay freight and insurance, and

delivery was to be made to them on payment of a sight draft for the price. The captain of the vessel gave the plaintiff a bill of lading describing him as the consignor, and in it, under the heading "consignees" was written "Order of Bank of Montreal, advise Melady & McNairn (defendants)." A draft for the price, drawn by the plaintiff upon the defendants, was attached to the bill of lading and discounted, but the defendants refused to accept this draft.

Held, that there was, upon these facts, no final appropriation of the wheat or delivery thereof to the defendants, and that the property therein would not pass to them until acceptance of the draft, or payment or tender of the price.

Held, also, that neither the shipment in the vessel provided by the defendants, nor the taking by the defendants of samples of the cargo for inspection, constituted an acceptance within the statute. Judgment of STREET, J., affirmed.

Aylesworth, Q.C., and *Rankin*, Q.C., for appellants. *Charles Millar*, for respondent.

From Robertson, J.] . ARMSTRONG v. LYE (No. 2).

Merger—Equitable right to a charge—Subsequent acquisition of the fee—R.S.O. c. 121, ss. 8, 9, 10.

In taking the accounts under the judgment reported, 27 O.R. 511, and 24 A.R. 543, it was held that the defendant Lye had no right to an equitable charge, in priority to the plaintiff's claim, for sums paid by Lye to prior encumbrances before the conveyance of the land to him, his potential equity not bringing him within ss. 8, 9 and 10, of R.S.O. c. 121, and there being no evidence of intention to preserve the right to the equitable charge. Judgment of ROBERTSON, J., affirmed.

Aylesworth, Q.C., and *Hilton*, for appellant. *Osborne*, for respondent.

From Divisional Court.]

[March 27.

McINTOSH v. PORT HURON PETRIFIED BRICK COMPANY.

Conversion—Tenant in common—Removal of chattel to foreign country.

An action for conversion of his interest in a chattel lies by one tenant in common against his co-tenants in common if the chattel owned in common is destroyed by them, or so dealt with by them as, in effect, to put an end to his rights.

In this case the removal of a brick making machine to a foreign country was held sufficient to support the right of action, the plaintiff's power of enforcing his rights in the courts of this province being thus interfered with. Judgment of a Divisional Court reversed,

S. H. Blake, Q.C., and *D. S. McMillan*, for appellants. *Aylesworth*, Q.C., and *J. H. Moss*, for respondents.

From Drainage Referee.]

[March 27.]

IN RE TOWNSHIP OF COLCHESTER NORTH, AND TOWNSHIP OF
GOSFIELD NORTH.

*Drainage — Report of engineer — Failure to take oath — Amendment
of report.*

Taking the oath prescribed in s. 5 of "The Municipal Drainage Act," R.S.O. c. 226, is an essential prerequisite to the exercise of jurisdiction by the engineer under s. 75 of that Act.

While an appeal to the Drainage Referee against a report is pending the initiating municipality cannot refer back the report to the engineer for amendment. Judgment of the Drainage Referee reversed.

Britton, Q.C., and Langton, Q.C., for appellants. A. H. Clark, for respondents.

From Drainage Referee.]

[March 27.]

IN RE TOWNSHIP OF ORFORD AND TOWNSHIP OF HOWARD (No. 2.)

Drainage—Natural watercourse.

Under sub-s. 3 of s. 3 of R.S.O. c. 226, lands in one municipality from which water has been caused to flow upon and injure lands in another municipality, either immediately, or by means of another drain, or by means of a natural watercourse, may be assessed and charged for the construction and maintenance of a drainage work required to relieve the injured lands from such water.

In re Townships of Orford and Howard (1891), 18 A.R. 496; *In re Townships of Harwich and Raleigh* (1894), 21 A.R. 677; and *Broughton v. Township of Grey* (1897), 27 S.C.R. 495, distinguished. Judgment of the Drainage Referee affirmed.

Douglas, Q.C., for appellants. Matthew Wilson, Q.C., for respondents.

SMYLIE v. THE QUEEN.

[April 4.]

Crown — Timber licenses — "Manufacturing condition." — Constitutional law.

The Act 68 Vict., c. 19 (o), making applicable to timber licenses the condition approved by order-in-council of the 17th February, 1897, that all pine timber cut under such licenses shall be manufactured into sawn lumber in Canada, is *intra vires*, and applies to licenses issued after the passing of the Act in renewal of licenses in force at the time of its passage. Judgment of STREET, J., 35 C.L.J. 761; 31 O.R. 202, affirmed.

H. J. Scott, Q.C., for appellants. S. H. Blake, Q.C., and Walter Gow, for respondent.

From Falconbridge, J.]

[April 4.

SNELL v. TORONTO RAILWAY COMPANY.

Master and servant—Negligence—Street railway—Motorman—Person in charge or control—Workmen's Compensation for Injuries Act, R.S.O. c. 160, s. 3, sub-s. 5.

The motorman of a car running on an electric system is a "person who has the charge or control" thereof within the meaning of sub-s. 5 of s. 3 of the Workmen's Compensation for Injuries Act, R.S.O. c. 160, and his employers are liable in damages to a fellow servant for injuries sustained while in discharge of his duty, owing to the motorman's negligence in passing too close to a waggon which is moving out of the way of the car. Judgment of FALCONBRIDGE, J., affirmed.

James Bicknell, for appellants. *T. C. Robinette*, and *J. M. Godfrey*, for respondents.

HIGH COURT OF JUSTICE.

Armour, C. J.]

GIRARDOT v. WELTON.

[April 3.

Costs—Counterclaim—Relief obtainable without cross-action—Set-off

The counterclaim of a defendant, properly so-called, is a claim by the defendant for a relief which cannot be obtained by him in the action; and calling a claim made by the defendant a counterclaim cannot make it one.

The plaintiff claimed a declaration that his interest as a chargee upon land could not be sold under the power in the defendant's mortgage upon such land, and, in the alternative, that he was entitled to redeem the defendant. By her pleading in answer the defendant alleged certain facts justifying her right to exercise the power of sale, and "by way of counterclaim" claimed payment of her mortgage, sale or foreclosure, possession, costs and damages. The action was at the trial dismissed with costs, the defendant not desiring a foreclosure, which she was offered.

Held, that the relief claimed by the defendant was obtainable by her in the action brought against her, and was not the subject of a cross-action or counterclaim; and the only costs taxable by the plaintiff against the defendant were such costs as were occasioned to the plaintiff by reason of the claim made by the defendants, treating it as a claim properly made in the action and dismissed; and such costs should be set off *pro tanto* against the defendant's costs of the dismissal of the action. The judgment dismissing the "counterclaim" with costs meant that such costs should be taxed as were appropriate to it in its true character.

Semble, that in this province the law as to set-off is different from the English law, and here a set-off should not be treated as a counterclaim nor be pleaded as such.

F. E. Hodgins, for plaintiff. *S. White*, for defendant.

Meredith, C.J., Falconbridge, J.]

[April 4.]

TANNER v. WEILAND.

Security for costs—Appeal to Divisional Court—Rule 825.

Rule 825, providing that no security for costs shall be required on a motion or appeal to a Divisional Court, does not preclude a defendant from obtaining an order for security for costs where the plaintiff has taken up his residence abroad after a judgment dismissing his action without costs, from which his appeal to a Divisional Court is pending. *Arnold v. Van Tuyl*, 30 O.R. 663, distinguished.

Grayson Smith, for plaintiff. *Haverson*, for defendant Christina W. Weiland.

Boyd, C., Robertson, J., Meredith, J.]

[April 6.]

REGINA v. KEMPEL.

Criminal law—Extortion—Accusation—Information—Criminal Code, ss. 405, 558.

The word "accuses" in s. 405 of the Criminal Code, providing for the punishment of anyone who, with intent to extort or gain anything from any person, *accuses* that person or any other person of certain offences, includes the accusing of a person by laying an information under s. 558 of the Code.

J. R. Cartwright, Q.C., for the Crown. *David Robertson*, for the prisoner.

Meredith, C.J., Falconbridge, J.]

[April 10.]

ALLISON v. BREEN.

Limitation of actions—Judgment—Reviver—Time—Notice—Ex parte order—Application to set aside.

Decisions of STREET, J., and the Master in Chambers, ante p. 165, refusing to set aside order reviving judgment, affirmed on appeal.

Boice v. O'Leane, 3 A.R. 167, as to the lifetime of a judgment, followed in preference to English decisions.

The practice of dealing with the question raised on an application to set aside an ex parte order as if the application were a substantive one for such order, approved.

Tytler and *C. J. McCabe*, for the appellant. *R. J. Maclellennan*, for the plaintiff by revivor.

Armour, C.J., Street, J.]

[April 10,

BOTHWELL v. BURNSIDE.

Criminal procedure—Court of General Sessions—Appeal—Costs—Criminal Code, ss. 880, (e), 897.

On an appeal to the General Sessions of the Peace from a conviction of a Police Magistrate, the chairman gave judgment, signing the following

minute: "Appeal in this case dismissed with costs to be taxed by the Clerk of the Peace within five days." No formal order was ever drawn up in pursuance of this minute, but the Clerk of the Peace afterwards taxed the costs and on his certificate at a subsequent sittings of the Court of General Sessions an order was applied for and obtained for the issue of a distress warrant, for the amount of such costs.

Held, that under ss. 88o (e) and 897 it was necessary for a formal order to be drawn up in pursuance of the above mentioned minute and that therefore there was no warrant or authority for the certificate of the Clerk of the Peace or for the order of the Court of General Sessions directing the distress warrant, and the same must be quashed.

Appeals from summary convictions and the costs payable in respect thereof are founded upon the statute law, and the provisions of the law regarding them in England and in this country are essentially different. In this country in view of section 88o (e) and (f) of the Criminal Code, the necessary formal order in pursuance of the above minute might be drawn up at a future sittings of the Court of General Sessions, which is a continuing Court, and the costs included therein nunc pro tunc if necessary; and the power to grant costs and determine what costs are just and reasonable is not with us as it is in England confined to the justices at the same general sessions at which the appeal is heard.

Du Vernet, for appellant. *J. H. Moss*, for respondent.

Armour, C. J., Street J.,] *APPLEBY v. TURNER.*

[April 18.

Judgment—Action on bond—Rule 580—Writ of summons—Special indorsement—Statement of claim—Service by posting—Rule 574—Motion for judgment—Assessment of damages.

An action against the sureties in an appeal bond to recover the plaintiffs' costs of an appeal is in the nature of a claim for damages requiring assessment (see Rule 580), and a special indorsement of the writ of summons is inappropriate, and a judgment for default of appearance or default of defence is a nullity not curable by delay or acquiescence.

The defendants in this case not having appeared, the plaintiffs filed and posted up copies of a statement of claim, without filing the writ of summons and affidavit of service.

Held, that the posting of the statement could not, having regard to Rule 574, be treated as a service upon the defendants. But, even if it could be so treated, a motion for judgment thereon and an assessment of damages would be necessary. *Star Life Assurance Society v. Southgate*, 18 P. R. 151, followed.

Hislop, for defendants.

Meredith, C.J., Falconbridge, J.]

[April 23, •

SYDNEY CHEESE AND BUTTER ASSN. v. BROWER.

Discovery—Action for account—Denial of right—Production of books—Prejudice.

To an action by an incorporated association of cheesemakers against the president and salesman for an account of all moneys received by him for or on behalf of the plaintiffs for three years past, and the application thereof, and for delivery up of all books and documents in his possession belonging to the plaintiffs, and for an account of profits made by the defendant, one of the defences was that the defendant undertook the sale of the plaintiffs' cheese as a part of his own business, and that it was expressly agreed that he should not be called upon to divulge the names of the persons from whom he received orders, or give any other information touching his business or the account of sales or the bank account in connection with his business, and when examined for discovery he objected to produce his books and documents showing sales and prices realized and persons to whom sales made, because, as he alleged, that would in effect give the plaintiffs what they sought in the action before they had established their right to it, which was expressly contested.

Held, that, as the fiduciary relationship existing between the parties was practically admitted, the position of the plaintiffs in seeking accounts and inquiries was not exactly like that of a plaintiff whose right depended on his establishing a case for them at the hearing. The defendant set up an extraordinary agreement, the probability of establishing which was not very great, and this was an element in determining the matter in the exercise of a sound discretion. The plaintiffs were, therefore, entitled to the discovery.

Shepley, Q.C., for defendant. *A. Hoskin*, Q.C., and *S. Masson*, for plaintiffs.

Boyd, C.]

BELL v. WILSON.

[April 30.

Costs—Slander—Verdict for \$1.

Where, in an action of slander, the jury returned a verdict for the plaintiff for \$1, the trial judge refused to deprive the plaintiff of costs, his conduct not having been reprehensible, and the small verdict being explained by the condition of the defendant at the time the words were uttered.

A. C. Shaw, for plaintiff. *Watson*, Q.C., for defendant.

Province of Nova Scotia.

SUPREME COURT.

Full Court.]

RYAN v. CALDWELL.

[Feb. 7.

Mortgage—Action on covenant to recover difference between amount due and proceeds of sheriff's sale—Property in hands of third party and plaintiff not in position to give defendant further right to redeem.

Defendant mortgaged certain real estate to A. and afterwards conveyed the equity of redemption to E. P. A. who conveyed it to L. A. assigned the mortgage to the plaintiff, who foreclosed without making defendant a party to the proceedings. At the sheriff's sale plaintiff purchased the property for an amount less than the amount due for principal and interest on the mortgage, and afterwards conveyed to F.

Plaintiff having sued on the covenant contained in the mortgage to recover from defendant the full amount due, deducting the proceeds of the sheriff's sale.

Held, following *Kinnaird v. Trollope*, 39 Ch. D. 636; *Almon et al. v. Busch Ritchie's Equity Decisions* 362; and *Miller et al. v. Thompson*, (unreported) that plaintiff could only sue for the amount by which the proceeds of the sheriff's sale fell short of the amount due on the mortgage on giving defendant a further opportunity of redeeming, and that as this could not be done, the property having been disposed of to a stranger, there should be judgment for defendant. *Kenny v. Chisholm*, 19 N.S.R. 497 (affirmed on appeal to the Supreme Court of Canada), distinguished.

MEAGHER J. dissented.

A. Drysdale, Q.C., for appellant. *W. A. Henry*, for respondent.

Province of New Brunswick.

SUPREME COURT.

En Banc.]

EX PARTE VANBUSKICK.

[April 20.

Canada Temperance Act—Election—Irregularities—Scrutiny—Certiorari.

The holding of a polling station in an election under the first part of the Canada Temperance Act outside the territorial limits of the district for which such poll is held is not such an irregularity as will vitiate the election so long as the persons entitled to vote have had a fair opportunity of exercising their franchise and the election has been held in substantial accordance with the provisions of the Act.

Rule discharged for certiorari to remove certificate of County Court Judge on a scrutiny confirming declaration of returning officer.

M. G. Teed, in support of rule. *Harvey Atkinson*, contra.

En Banc.]

EX PARTE GREEN,

[April 20.

Profanation of Lord's Day—62 Vict., c. 11.

The above Act to prevent the profanation of the Lord's Day, is *intra vires* the Provincial legislature.

Rule discharged for certiorari to remove conviction for selling cigars on Sunday.

Pugsley, Q.C., and *A. W. Macrae*, in support of rule. *A. S. White*, Q.C., and *Stockton*, Q.C., contra.

En Banc.]

MELLON *v.* MUNICIPALITY OF KINGS.

[April 20.

Execution for taxes—Direction by Secretary-Treasurer — Municipality liable for false arrest.

The Secretary-Treasurer of the Municipality directed the issue of an execution against the plaintiff for taxes. The latter was arrested thereunder and confined in goal for fifteen days. In an action for false imprisonment the jury found that the plaintiff was not a resident of the county and did not own any real or personal estate within the county, and assessed the damages at \$250.

Held, on motion for a non-suit, that the municipality was liable for the act of the assessors in assessing the plaintiff and of the Secretary-Treasurer in directing the execution. Non-suit refused.

Stockton, Q.C., for plaintiff. *A. S. White*, Q.C., for defendant.

En Banc.]

RUNCIMAN *v.* STAR LINE STEAMSHIP CO.

[April 21.

Negligence causing death—Action by the father of deceased—Reasonable expectation of pecuniary benefit.

Plaintiff's son while boarding defendant's steamer on the River Saint John fell off the steamer's steps and was drowned. In an action by plaintiff, as administrator, for damages, the jury found that the steamer was started too quickly and that the steamer people were guilty of negligence. The deceased was about twenty-eight years of age and had always made his home with the plaintiff, his father. There was evidence that for several years he paid the plaintiff \$30 per month for board and lodging, but a year or two before his death he established himself in business in which he was assisted by the plaintiff to the amount of three or four hundred dollars, and since which time the plaintiff had received nothing from him. The jury found for plaintiff and assessed the damages at \$3,500.

Held, on motion for a non-suit, that there was no sufficient evidence of pecuniary loss to the plaintiff, that the circumstances were such as to afford a reasonable expectation of pecuniary benefit to the plaintiff had the deceased lived, and that this was enough to warrant the case being given to the jury, though there was nothing to justify so large an assessment. Nonsuit refused, but new trial on ground of excessive damages.

D. Mullin, Q.C., for plaintiff. *L. A. Currey*, Q.C., for defendant.

EX PARTE DUPUIS.

Review—Non-suit erroneously ordered by review judge—Certiorari.

The Judge of the St. John County Court on review from a justice's court set aside a judgment recovered by the plaintiff and ordered a non-suit on the ground that a prior suit before a Parish Court for the same cause of action, in which the plaintiff had elected to become non-suit, was still pending.

Held, on motion to make absolute an order nisi for certiorari, that the order of the review judge was improper and that certiorari would lie to remove the review order. Rule absolute.

J. D. Phinney, Q.C., in support of rule. *J. H. McFadyen*, contra.

Province of Manitoba.

QUEEN'S BENCH.

Bain, J.] QUEEN v. GREAT WEST LAUNDRY CO. [April 9.

Criminal law—Criminal Code, s. 3, sub-s. (t), ss. 213, 220, 639, 958—Man-slaughter—Negligence causing death—Corporation.

The defendant company was indicted, under sections 213 and 220 of the Criminal Code, 1892, for negligence in maintaining machinery in a condition dangerous to life, resulting in the death of one of its employees. There was also a count for manslaughter. Defendant demurred to the indictment.

Held, that notwithstanding sub-s. (t) of s. 3 of the Code, by virtue of which sections 213 and 220 generally apply to corporations as well as individuals, an indictment will not lie against a corporation for manslaughter, and even if a corporation were indicted and convicted of such an offence, there is no provision of law under which any punishment could be imposed.

The punishment for manslaughter being imprisonment for life under section 236 of the Code, section 958 does not apply and a fine cannot be imposed in lieu of imprisonment. The general provision of section 639 that in case of the conviction of a corporation, the court "may award such judgment and take such other and subsequent proceedings to enforce the same as are applicable to convictions against corporations," could not be interpreted so as to affect or modify the positive enactment of section 236.

Patterson and A. J. Andrews, for the Crown. Howell, Q.C., for defendant.

Province of British Columbia.

SUPREME COURT.

Full Court.]

SULLIVAN *v.* JACKSON.

[Jan. 9.

Practice—Application to dismiss for want of prosecution after notice of trial—Rule 340.

Appeal to the Full Court by defendant from an order of Forin, Loc. J.S.C., dated 22nd December, 1899, dismissing defendant's summons to have the action dismissed for want of prosecution. The local judge held that once notice of trial has been given it is not open to the defendant to apply to have the action dismissed for want of prosecution.

Held, allowing the appeal, that a judge sitting in Chambers has power to dismiss an action for want of prosecution, notwithstanding that the action has been entered for trial.

Galt, for appellant. *A. E. McPhillips*, for respondent.

Full Court.]

BAKER *v.* KILPATRICK.

[Feb. 22.

Malicious prosecution—Reasonable and probable cause—Belief of defendant—Malice—Questions to jury.

In an action for malicious prosecution the judge intimated that he thought there was no evidence to go to the jury but he decided to let the case go to the jury so that the Full Court might have the benefit of the findings in case an appeal was taken. The jury found that the defendant had not taken reasonable care to inform himself of the facts before he proceeded against the plaintiff, and that he did not honestly believe in the charge, being actuated by an indirect motive, viz.: to obtain recompense for the loss of his horse. Damages were assessed at \$200.00.

On motion for judgment, McCOLL, C.J., dismissed the action holding that there was not a want of reasonable and probable cause.

Held, by the Full Court, reversing McCOLL, C.J., that on the findings the plaintiff was entitled to judgment. *Shrosbery v. Osmaston*, (1877) 37 L.T.N.S. 792, followed.

Martin, Q.C., for appellant. *Yarwood*, for respondent.

Book Reviews.

A Preliminary Treatise on Evidence at the Common Law, by J. B. Thayer, Weld Professor of Law at Harvard University. Boston : Little, Brown & Co., 1898.

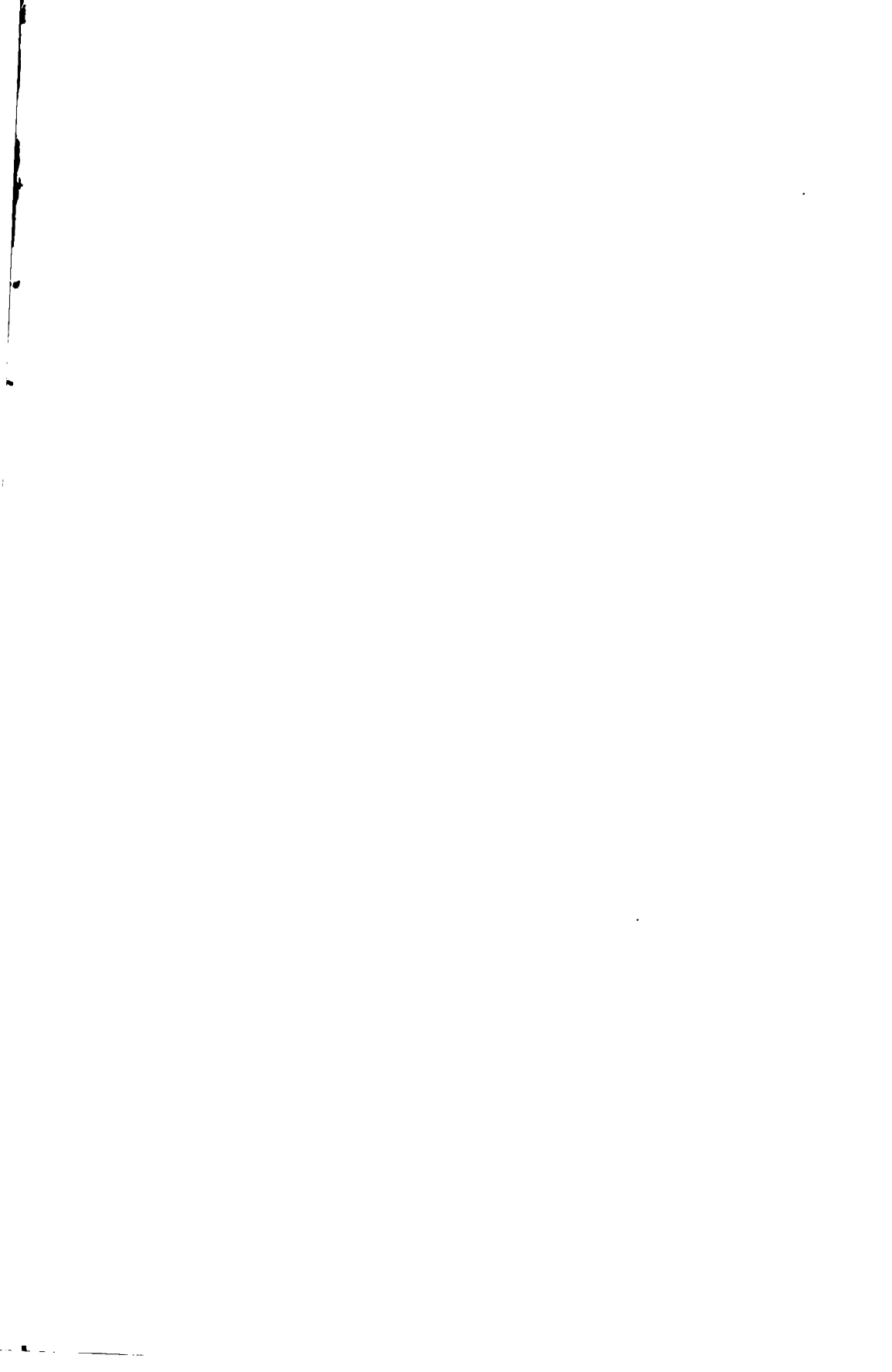
The well-known Digest of the Law of Evidence by the late Sir James Stephen has systematized very satisfactorily that department of our jurisprudence by summing up in clear and succinct propositions the actual effect of the decisions. But the plan of that work necessarily excluded any adequate elucidation of the subject from a historical standpoint. To those who are desirous of examining under this aspect a topic of such deep interest to the profession we can cordially recommend an attentive perusal of the above-mentioned treatise. The author is a distinguished member of that body of scientific jurists who have within recent years so worthily co-operated on this side of the Atlantic in the investigations by which such writers as Sir Frederick Pollock and Professor Maitland have thrown light upon the growth of the common law. The objects of Professor Thayer, as stated in his preface are these : " By tracing the development of trial by jury, to throw light on the beginnings and true character of our rules of evidence ; by a more accurate analysis and a fuller illustration than is common, of the distinction between law and fact, to make plainer the respective functions of the jury and the court ; and by an investigation of certain important topics, ordinarily, but, as he believes, improperly treated as belonging to the law of evidence, to discriminate from that part of the law, and to set them in their proper place." In the dissertations outlined by these titles the learned author has accumulated a great quantity of useful information which he has worked up in a clear and readable style. Not the least valuable feature of the book is the running commentary of acute and pregnant criticism which accompanies his account of the evolution of the various doctrines discussed. We feel confident that few lawyers, however much attention they may have devoted to the scientific aspects of our law, will refuse to admit that they have added very appreciably to their stock of ideas, when they have finished the perusal of the chapters on " Law and

Fact in Jury Trials;" "Judicial Notice;" "Presumptions;" "The Burden of Proof;" "The 'Parol Evidence' Rule," and "The 'Best Evidence' Rule." With these topics Professor Thayer has been able to deal in a manner which would be inappropriate in an ordinary law book compiled for the use of practitioners, and the value of his discussions is in a great measure due to the freedom of treatment which is suggested and warranted by the character of the treatise as a companion of and introduction to works which aim merely at stating what the law is, and do not concern themselves, except incidentally, with its development or with the anomalies which are the result of the processes in which that development has been carried on. There is a great deal in Professor Thayer's dissertations that is calculated to ruffle the feelings of the optimists who adhere with a pathetic fidelity to the creed that our system of law is really as well as theoretically the essence and embodiment of common sense. But those who cannot discern any sufficient reason why that system should be exempt from the searchlight of modern criticism any more than the various other products of the "wisdom of our ancestors," which in these days have been compelled to justify their existence, will be glad to profit by his thoughtful remarks. What he has to say is of special utility to students, and his book should be in the library of every law school.

APPOINTMENTS TO OFFICE.

J. F. J. Cashman, of the Town of Gore Bay, in the Provisional Judicial District of Manitoulin, to be District Crown Attorney and Clerk of the Peace for the said District. (13th January, 1900.)

James Craig, of the Town of Renfrew, in the Province of Ontario, Barrister-at-Law, to be a Judge of the Territorial Court in and for the Yukon Territory. (26th April, 1900.)





E. F. B. JOHNSTON, Q.C.



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E. F. B. JOHNSTON, Q.C.

One of the best known men at the Bar, although still young in years, is the gentleman whose portrait appears on the opposite page. His reputation as a criminal and jury lawyer has caused his name to be known more widely than many of longer standing at the Bar who would perhaps be first choice for term work. He is now very prominently before the public, having just brought to a successful termination the prosecution against the dynamiters in the case already referred to in these columns as the "Outrage at the Welland Canal." His selection by the Government to take charge of this important matter, demonstrates the high position which he occupies.

Mr. Johnston is a native of Haddington, Scotland. He studied law at the City of Guelph, and began the practice of his profession there, where he remained for about eight years, when he was appointed Deputy-Attorney General, under Sir Oliver, then Mr. Mowat. After occupying this position for four years, he resigned in the fall of 1889, and returned to active practice, forming the partnership of Johnston & Ross, which has since continued. This firm commenced business in the City of Toronto with no connection or influence, and has gradually worked to the front. Mr. Falconbridge, son of Mr. Justice Falconbridge, joined the firm in the beginning of this year. For three years, until 1892, Mr. Johnston was Inspector of Registry Offices, but the increase of his business compelled his resignation of that office, which is now held by Donald Guthrie, Q.C.

In his earlier professional life he was inclined towards politics, taking an active part therein and being well-known as a platform speaker in Wellington and the counties adjoining. He has refused more than one nomination by the Liberal party, but on his resuming practice in Toronto, he decided to devote his whole energies to his profession. At Guelph, he was secretary and one of the leaders of the Reform Association of South Wellington.

In his earlier days he was an enthusiastic Scotchman and Chief for several years of the Caledonian Society at Guelph, then the largest of its kind in Canada.

Mr. Johnston has had much experience in eriminal law, and in his first criminal case, was junior to the late Sir M. C. Cameron, in the then celebrated case of the *Queen v. Sturdy*. No one at the bar has been engaged in so many important criminal trials during the past six years. As his abilities became known, his career has been rapid and successful in civil as well as criminal cases. The first case which brought him into prominence in Toronto was the murder trial of Clara Ford in which he led for the defence. He also acted as one of the leading counsel in the cause celebre of the *Queen v. Hyams*. The first trial of this case, which lasted two weeks, resulted in a disagreement of the jury, and the next, which lasted over three weeks, resulted in an acquittal. One of the prominent features in this trial, and which was spoken of as a masterly effort, was Mr. Johnston's cross-examination of the medical testimony. In this line he has, as a lawyer, no superior.

Among other important trials he defended the prisoners in the *Queen v. Dick*, Mrs. Sternaman in the *Queen v. Sternaman* and the actor Emerson, in the *Queen v. Emerson*, all for murder, and in all these cases he was successful. In the well-known case of the *Queen v. Hammond*, he defended the prisoner against hopeless odds and obtained two new trials for him, the only instance of such an event in Canadian Courts.

Mr. Johnston has acted for the Crown in several important criminal prosecutions. One of his earliest cases after resuming practice was the *Queen v. Day*, in which the prisoner was indicted for killing his wife at Niagara Falls. He also acted for the Crown in the *Queen v. Harvey*, in which the prisoner was indicted for murdering his wife and some members of his family at Guelph. He also acted for the Crown in the *Queen v. Prevost*, and in the well-known case of the *Queen v. Brennan*, in which the prisoner was indicted for the murder of the late Mr. J. A. Strathy, of Barrie and twice tried. In each of these cases the prisoner was convicted. He has also acted for the Crown in other important cases, and was one of the Counsel in the well-known Constable Case, which determined the right of the constables employed at election booths to vote.

But it is not as a criminal lawyer alone that Mr. Johnston has come so rapidly to the front. His briefs in civil cases are many and increasing. His forte may be said to be as a *nisi prius* lawyer. To succeed in this, a man has to think on his feet and to general his case as its features develop. In this, he has no superior. He

has abandoned the old fashioned declamation by means of which nisi prius lawyers have tried to work on the feelings of a jury, and has instead, adopted a business-like method of putting those prominent facts, which in his opinion should determine the fate of the case, in a strong light before the jury. In speaking, he is slow and deliberate, and in cross-examination, owing to his rapidity of thought and to the careful preparation which he devotes to his cases, he is at his best and has few equals. His exposition of the law relating to the case which he has in hand is always lucid and painstaking. His position in the profession which he has chosen is assured, and he is now one of the leading senior counsel at the Ontario Bar.

Mr. Johnston, like most eminent men in his profession, has a hobby. He has an artist's eye for a fine picture. His collection of water colors is probably the best in Toronto, and one of the largest in the Dominion. He has also a great fancy for delft and has one of the largest collections of old Dutch delft in America. He takes an active interest in art matters, and has frequently exerted himself in encouraging talented Canadian artists, and wherever one such presents himself he finds a ready friend in Mr. Johnston.

The Soldiers of the Queen have virtually ended the war and the Empire rejoices. British justice will now take the place of Boer tyranny.

A meeting of members of the County Library Associations throughout Ontario has been called for Saturday, June 30th next, at Osgoode Hall, Toronto, at which meeting matters of general interest affecting the profession will be discussed, such as the advisability of making the Law School self sustaining or abolishing it, the election of a larger proportion of younger men as benchers and the reduction of the annual solicitor's fees by any amount which may be paid by members of the County Law Associations to their local branch

The case of *The Queen v. Dullman, Nolin, and Walsh*, recently tried at the Welland Assizes is well worthy of note as testifying to the swiftness and certainty with which criminal justice is administered in Canada. The very serious crime by which the prisoners sought to destroy one of the great public works of the Dominion took place at 7 p.m. on April 21st. The same evening at 9 p.m.

they were arrested and lodged in jail. Evidence was rapidly gathered and sifted, and within ten days the preliminary examination before the magistrate took place, thirty-five witnesses being examined at the three sittings. On May 14th the prisoners were committed for trial. The indictment for the offence for which the prisoners were charged was presented to the Grand Jury on the 23rd of May, and a true bill found. On the morning of the Queen's birthday (which, by the way, the presiding Judge, Chancellor Boyd, said "Although a holiday was an appropriate day to do the Queen's business") the case was called, and within one hour the jury panel was selected and the trial begun. During the first day the evidence of thirty-three witnesses was taken between 11.30 a.m. and 7 p.m. On the second day the case was finished, the Judge's charge being concluded at 6 p.m. At 6.35 the jury brought in a verdict of guilty against all three prisoners. By 6.45 the prisoners were sentenced to the penitentiary for life, and within a few hours were removed to their present abode at Kingston. The detective department did its work well, and was most energetically and intelligently aided by the United States authorities. Too much praise cannot be given to Mr. E. F. B. Johnston, Q.C., for his skilful management of the case for the Crown, whilst Mr. German deserves his meed of praise for loyal devotion to the interests of his client, Dullman. One can imagine that the culprits and their instigators may now have come to the conclusion that whilst British justice gives absolute fair play to anyone charged with crime it is an act of folly to trifle with a machine which, with ceaseless activity and unimpassioned precision, works out an adequate and just conclusion.

SUPREME COURT PRACTICE.

In the case of *Farquharson v. The Imperial Oil Co.*, lately decided by the Supreme Court of Canada, a question of practice was raised which is of great importance to the Ontario profession. A report of the case will appear in the next number of the reports, but a brief summary may enable the profession to understand the situation more clearly.

The plaintiff in the case appealed from the decision at the trial to the Divisional Court, and, being unsuccessful there, had no appeal as of right to the Court of Appeal. He therefore applied to the Registrar of the Supreme Court in Chambers for leave to

appeal direct to the latter Court under s. 26, sub-s. 3 of the Supreme Court Act. This leave was refused by the Registrar, and the plaintiff appealed to Mr. Justice Gwynne in Chambers, who held that in cases where recourse to the Court of Appeal is taken away, the Divisional Court is the highest Court of last resort in Ontario, and that plaintiff could appeal as of right to the Supreme Court. He also, though considering it unnecessary, granted leave to appeal under s. 26 (3). An appeal from this decision to the full court was dismissed on the ground that the Court would not interfere with the order granting leave to appeal, and the case was, in the following term, argued on the merits.

After judgment had been given on the merits, the Chief Justice and Mr. Justice Taschereau handed out written opinions on the above question of jurisdiction, the Chief Justice agreeing with Judge Gwynne that leave to appeal under s. 26 could properly be given, Judge Taschereau taking the contrary view and holding that the appeal should have been quashed when first before the Court. Sedgewick, J., agreed with Judge Taschereau; Girouard, J., gave no opinion on this question, and King, J., was not present on the first hearing. These important questions of jurisdiction remain, therefore, undecided, and the position may be stated in this way. Mr. Justice Gwynne alone held that there was a right of appeal from the judgment of the Divisional Court. The Chief Justice and Gwynne, J., that leave to appeal could be granted under s. 26. Taschereau and Sedgewick, JJ., that there is neither a right of appeal nor power to grant leave. King and Girouard, JJ., have expressed no opinion either way.

It must be borne in mind that their Lordships heard no argument on these questions, and the Ontario Bar will no doubt look eagerly for the matter to come before the Court again. When it does, no one would venture to predict the issue. In addition to the forcible reasons given by the Chief Justice and Mr. Justice Gwynne, is the fact that those of the former cannot matter against a previously expressed opinion, as will appear from the cases cited by Mr. Justice Taschereau. On the other hand, Mr. Justice Taschereau makes a strong case, and there are other considerations, argumentative and statutory, to support his view. If the matter should come up again before a full bench, it might result in an equal division, in which case the jurisdiction of the Court would be established against the opinion of half the judges.

C. H. MASTERS.

 ENGLISH CASES.

 EDITORIAL REVIEW OF CURRENT ENGLISH
 DECISIONS.

(Registered in accordance with the Copyright Act.)

SPECIFIC PERFORMANCE—AGREEMENT FOR LEASE OF UNDIVIDED MOIETY IN MINERAL PROPERTY.

Hexter v. Pearce (1900) 1 Ch. 341, was an action for the specific performance of an agreement for a lease of an undivided moiety in a mineral property, with liberty to work and dig and sell the same. A doubt expressed by Knight Bruce, L.J., in *Price v. Griffith*, 1 D. M. & G. 80, as to whether the Court would grant specific performance of such a contract, was relied on by the defendants; but Farwell, J., was of opinion that the doubt of Knight Bruce, L.J., was not whether specific performance of a contract for a moiety should be granted, but whether it should be granted as against a person who really intended to buy or sell not a moiety, but the whole interest, and as no such difficulty existed in the present case he felt no difficulty in giving the plaintiffs the relief they asked.

PARTIES—FRAUDULENT PROSPECTUS—COMPANY AND DIRECTORS JOINED AS DEFENDANTS—DIRECTORS LIABILITY ACT, 1890 (53 & 54 VICT., c. 64) s. 3—(R.S.O. c. 216, s. 4).

In *Frankenburg v. Great Horseless Carriage Co.* (1900) 1 Q.B. 504, the Court of Appeal (Lindley, M.R. and Romer, L.J.) had to deal with a question of practice. The action was brought against the defendant company and its directors and the personal representatives of a deceased director, claiming as against the company cancellation of an allotment of shares to the plaintiff and the rectification of the company's register of members by the removal of the plaintiff's name therefrom, and against the other defendants pecuniary damages, on the ground that the plaintiff had been induced to subscribe for the shares in question by reason of statements contained in a prospectus issued by the defendants which the plaintiff claimed were false and calculated to mislead. Channel, J., was of opinion that there was a misjoinder of defendants and required the plaintiffs to elect whether they would proceed against

the directors alone, and dismissed the action as against them in case the plaintiff refused so to elect. The Court of Appeal, however, came to the conclusion that there was really only one cause of action viz., the issue of the false prospectus, and that it was no ground for striking out the names of the directors, or the compelling the plaintiff to elect to proceed against them alone, that the relief claimed against them differed in detail from that claimed against the company. A point was raised as to whether the action against the deceased director's personal representatives would lie, but the Court of Appeal held that this question would have to be left for the trial and could not be disposed of on the present application. See *Greenwood v. Leather Shod Wheel Co.* (1900) 1 Ch. 421, noted post.

SALE OF GOODS—CONTRACT—IMPLIED CONDITION THAT GOODS ANSWER DESCRIPTION — PASSING OF PROPERTY — SALE OF GOODS ACT, 1893 (56 & 57 VICT., C. 71,) SS. 13, 17, 35.

Varley v. Whipp (1900) 1 Q.B. 513, is a decision under the Sale of Goods Act, 1893, which is one of those codifying Acts passed of recent years in England, embodying in a statute the law as it had previously been formulated by judicial decisions on the subject of the sale of goods. Although the Act has not been reproduced in Ontario, the case is nevertheless of authority here. The action was brought for the price of a reaping machine, which the plaintiff agreed to sell and the defendant agreed to buy before he had seen it, and which the plaintiff stated to have been new the previous year, and to have been used to cut only fifty or sixty acres. The machine was delivered, and, shortly after, the defendant wrote complaining that it did not correspond with plaintiff's statement, and after some further correspondence the defendant returned the machine. Section 13 of the Act enacts, "Where there is a contract for the sale of goods by description there is an implied contract that the goods shall correspond with the description. . . ." And the first point to be determined was whether the sale in question was 'a sale by description.' Channell and Bucknill, JJ., held that it was. As Channell, J., puts it, "The term 'sale of goods by description' must apply to all cases where the purchaser has not seen the goods, but is relying on description alone."

The next question was, Had the property in the goods passed to the purchaser? And the Court held that the earliest date at

which it could pass was when the machine was accepted by the purchaser.

Section 35 of the Act enacts, "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

And the Court held that there had never been an acceptance of the goods.

CONTRACT—PRINCIPAL AND AGENT—UNDISCLOSED PRINCIPAL—RATIFICATION—SALE OF GOODS.

Durant v. Roberts (1900) 1 Q.B. 629, is a very interesting case on the law of contracts, and is remarkable for the strong and emphatic difference of opinion on the point in question in the case between Smith, L.J., on the one hand and Collins and Romer L.JJ., on the other. The point in controversy is one that one would assume must long ago have been settled by judicial decision. And so Smith, L.J., considers to be the fact, whereas the other members of the Court of Appeal are equally clear that the point is not covered by any previous authority, and was open for decision. The facts were very simple: One Roberts had contracted to buy a quantity of wheat from the plaintiffs; he did not profess to be acting for anyone but himself, but he had it in his mind that a firm of Keighley, Moxsted & Co. would join him in the venture, and on their being subsequently informed of the contract they said that they thought Roberts had agreed to give too much, but that they thought the wheat worth the price, and told him to take it. On this evidence the vendors, who were plaintiffs suing for the price, claimed to recover against Keighley, Moxsted & Co. Day, J., who tried the case, was of opinion that as Roberts, when he entered into the contract, did not profess to be acting on behalf of any principal, there could be no ratification by Keighley, Moxsted & Co. of the contract, and he therefore directed a verdict in their favour. With this view Smith, L.J., agreed, and, after an elaborate review of the cases, claims that it has the support of such eminent judges as Lords Wensleydale and Cairns; Tindal, Erle and Cockburn, C.JJ.; Brett and Bowen, L.JJ.; Rolfe, Parke, Wilde, Martin, and

Amphlett, BB.; and Holroyd, Wills and Blackburn, JJ. But the opinions of these learned judges are held by the other members of the Court to be merely dicta, and on principle they hold there is no sound reason why a principal may not, under such circumstances, ratify the contract. The actual disclosure of a principal's name is clearly unnecessary, and it is now held that it is not even necessary for the agent to disclose that he is acting as agent.

NEGLIGENCE—LIABILITY OF EMPLOYER FOR NEGLIGENCE OF CONTRACTOR.

The Snark (1900) P. 105, although an admiralty case, serves to illustrate a branch of the law of negligence which has of late years been very frequently discussed. A barge belonging to the defendants was, without negligence on their part, sunk in the fairway of a navigable river. The defendants employed an under waterman to conduct the salvage operations necessary to raise her and for that purpose put him in possession and control; but owing to the guard-vessel, placed by him with lights upon it to mark the submerged vessel, having been negligently allowed to get out of position, the plaintiff's vessel, without negligence, ran upon the sunken barge and was damaged. The Court of Appeal (Smith, Rigby and Collins, L.JJ.) affirmed the decision of Barnes, J. (1899) P. 74 (noted ante vol. 35, p. 304) that the defendants were liable following *Penny v. Wimbledon* (1899) 2 A.B. 72 and *The Utopia* (1893) A.C. 492. The following statement of the law taken from the judgment of Bruce, J., in *Penny v. Wimbledon* is cited by Smith, L.J., with approval :—"When a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and if necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor."

VOLUNTARY GIFT—GIFT MADE ON INNOCENT MISREPRESENTATION OF FACT—MISTAKE—DONOR'S RIGHT TO RECOVER GIFT.

In re Glubb, Bamfield v. Rogers (1900) 1 Ch. 354, turns upon the question of the effect of a voluntary gift obtained by means of an innocent misrepresentation of facts, and as to whether or not a donor on hearing the true state of facts has a right to recover his gift. The question arose in an administration action respecting a testator's estate. By his will the testator had given legacies of

various amounts to seven named charitable institutions, coupled with a condition that within four years of his decease each of the legatees should raise by voluntary subscriptions an amount equal to the legacy bequeathed to such legatees. And if any of the legatees failed to raise within the specified time the required sum, then the legacy bequeathed to them should be offered to the other legatees, on the same terms of raising an equivalent sum, observing their order as regards priority, and giving each a reasonable time to raise the required amount, and such of the legacies as were not taken up within seven years of the testator's decease were to form part of his residue. Some of the legatees issued circulars soliciting subscriptions on the representation that if the required amount was raised the legatees would be entitled to the legacy given by the testator, and on the faith of this representation the required amount was raised, but it turned out that, owing to the money not having been obtained within the four years, the terms of the will had not been complied with and the legacies were not payable. In order to avail themselves of the terms laid down in the will in regard to the deferred legacies, the charitable institutions concerned issued a circular explaining the reason of the failure to secure the original legacy, and asking the subscribers to allow their subscriptions to be applied towards a fund in order to entitle the legatees to the deferred legacies, and this they agreed to do, and the amount required to entitle the legatees to take the deferred legacies was thus raised. The point, however, was raised on behalf of the residuary legatees, whether the amounts originally subscribed to meet the original legacies could, by consent of the donors, be thus transferred to a fund to entitle the legatees to the deferred legacies, and that question depended for its solution on what are the legal and equitable rights of donors to moneys given by them on the faith of an innocent misrepresentation; for if they have the right to claim a return of their money, then they have a right to dispose of it by applying it to a fund to meet the deferred legacies. The Court of Appeal (Lindley, M.R., and Williams and Romer, L.JJ.) were of opinion that a donor has an equitable right (though perhaps not a legal right) under such circumstances to have his money refunded, and, that being the case, they held that the donors' consent was efficacious to transfer their subscriptions to a fund to meet the deferred legacies, and the decision of North, J., to the contrary was consequently reversed.

COMPANY—WINDING-UP—RESCISSION OF CONTRACT TO TAKE SHARES—PROCEEDINGS COMMENCED BEFORE WINDING-UP ORDER.

In re General Railway Syndicate (1900) 1 Ch. 365, was an appeal from a decision of Wright, J. (1899) 1 Ch. 770 (noted ante vol. 35, p. 487), holding that a shareholder was too late to obtain a rescission of a contract to take shares on the ground of misrepresentation, after a winding-up order had been made. The shareholder sought to obtain this relief by counterclaim in an action brought by the company for calls commenced before the winding-up order, but the counterclaim was not delivered until after the winding-up order had been made, though the defendant had previously made affidavit in answer to a motion for speedy judgment, stating his intention to counterclaim for rescission of the contract to take shares on the ground of misrepresentation, and on that ground got leave to defend. The Court of Appeal (Lindley, M.R., and Williams and Romer, L.JJ.,) were unable to agree with Wright, J., and held that the shareholder had commenced his proceedings for rescission in time, and was not precluded by the winding-up order from claiming a rescission of the contract.

SALE BY COURT—PURCHASER FOR VALUE WITHOUT NOTICE—CONVEYANCING AND LAW OF PROPERTY ACT,, 1881, (44 & 45 VICT., C. 41), S. 70—(ONT. JUD. ACT, S. 58 (11).)

In *Jones v. Barnett* (1900) 1 Ch. 370, the Court of Appeal (Lindley, M.R., and Rigby and Williams, L.JJ.,) have affirmed the decision of Romer, J. (1899) 1 Ch. 611 (noted ante vol. 35, p. 408), to the effect that the Conveyancing and Law of Property Act, s. 70, (Ont. Jud. Act, s. 58 (11)), does not validate the title of a purchaser at a sale by the Court, as against persons who were not parties to, or bound by, the proceedings in which the sale takes place, and whose interests the Court did not in fact intend to sell.

The Forum.

A CAUSERIE OF THE LAW.

CONDUCTED BY CHARLES MORSE.

It seems to be our sad métier of late to continuously chronicle the deaths of eminent members of the English Bar. Since our last writing Mr. Charles Isaac Elton, Q.C., and Mr. F. O. Crump, Q.C., have both passed away. Mr. Elton had a place in legal and antiquarian literature, as well as enjoying at one time a large Equity practice. His "Copyholds and Customary Tenures," and "Origins of English History" will serve to perpetuate his memory.

* * * Mr. Crump, Q.C., might have left some literary achievement behind him had his life been less exclusively devoted to the practice of his profession. He was a profoundly religious man, and it is touching to know that in the bag he had with him at the time he was stricken down with his fatal illness there was found an unfinished essay from his pen on, "The Outward Aspect of Christ." If it be true, as Renan claims it is, that there is only one saint in the calendar who was a lawyer by profession, we take comfort in the fact that so many sincere, and withal unostentatious, Christians, such as the subject of this notice, have lived and died within its ranks.

* * * The Edward Thompson Company, publishers of the admirable "American and English Encyclopædia of Law," have generously forwarded to Mr. Justice Burbidge, of the Exchequer Court, their cheque for \$100, to be applied to the Relief Fund for the sufferers by the recent fire in Ottawa and Hull.

* * * While lawyers will recognize the literary value of Mr. W. S. Lilly's recently published "First Principles in Politics," they will hardly be disposed to agree with all of the learned author's conclusions. Take, for instance, this generalization: "A striking characteristic of the present day is the well-nigh total effacement from the general mind of the idea of law." So far from concurring in this view, we take it that there never was a time when the "general mind" in the study, as well as the mind of the "man in the street," were so pervaded with juridical considerations. That

all-absorbing topic—the betterment of the existing relations between Capital and Labour—gives rise to legal theories and speculations on the part of both employer and wage-earner; and is argued simultaneously, but from necessarily different points of view, in the Chambers of Commerce and the Trades-Unions. The columns of the daily press are eloquent of this fact. Add to this the circumstance that the philosophic mind of to-day is much given to the exploitation of economic and sociological questions, which often invade the domain of law, and we think our exception to Mr. Lilly's postulate is fairly sustained. We would refer to the well-known works of Herbert Spencer, in support of our statement concerning fin-de-siècle philosophy. Then, too, the present expansionist movement of the Anglo-Saxon race opens up considerations of positive law on its international side, which through the ubiquitous medium of newspapers, are bound to arrest the attention of the average reader. Mr. Lilly seems to evolve his view from what he assumes to be the fact, namely, that physical science is now the supreme field of activity for the "general mind;" and he thinks that it does not lend itself to the promotion of jural conceptions, but rather tends to obliterate them. We believe, however, that sociology per se has more of a hold on the general mind to-day than physical science.

It is due to Mr. Lilly to say, that while he is undoubtedly laudator temporis acti, he does not wholly despair of the future well-being of mankind.

* * * Apropos of the law of Criminal Evidence: The Canada Evidence Act, 1893 (56 Vict., c. 31) s. 3 provides that "a person shall not be incompetent to give evidence by reason of interest or crime." This provision appears to be new, as it was not contained in the Evidence Act, R.S.C. c. 139. By the Imperial Act, 6 and 7 Vict., c. 85, s. 1, it was enacted that the evidence of any witness was admissible "notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence." In *Reg. v. Webb* (1867, 11 Cox C.C. 133) Lush, J., refused to receive the evidence of a felon under sentence of death, holding that the above Imperial enactment did not overcome the old common law disability of civiliter mortuus in such a case. In *Graeme v. Globe Printing Co.* (noted in 13 Leg. News (1890) at p. 409) the Master in Chambers applied the doctrine of

Reg. v. Webb to a question arising in a civil case where the enabling provisions in such behalf of the Ontario Evidence Act were invoked. The provisions of the Canada Evidence Act of 1893 are no wider than the English or Ontario statutes referred to, and we opine that under it the common law disability still attaches to a person condemned to death. It is to be said, however, that Taylor ("Evidence," s. 1347 n.) doubts the case of *Reg. v. Webb*.

Correspondence.

JUDICIAL SENTENCES.

To the Editor CANADA LAW JOURNAL :

Dear Sir :—The apportionment of punishment is always a difficult one, and unless one is familiar with all the circumstances of the case it is not well to find fault. It is therefore with some diffidence that I venture to suggest that the sentence pronounced by Mr. Justice Street on Arthur McIntyre, who shot and killed his father, was inadequate. If the boy's mental condition was such that he was unaccountable for his act it would have been more appropriate to have sent him to some asylum where he would be under careful medical supervision. If, however, he was perfectly sane, and there was no attempt to cast any doubt upon this, and his conduct at the trial did not warrant any such thought or in fact excite much sympathy, four years' confinement in an institution which is really an industrial school rather than a place for criminals, does not seem to be a punishment which can be said to carry with it the deterrent effect which would be appropriate for such a heinous offence. The lightness of the sentence has given rather a shock to the public ; but as the learned judge who tried the case has a large fund of strong common sense and is the last person to be afflicted with any maudlin sentimentality, we can only suppose that there were some good reasons for the course he adopted.

Yours etc., READER.

[Being aware that many had the same thoughts on this matter as our correspondent, we have taken the trouble of making as full enquiries as possible as to the circumstances attending this painful case which may have weighed with the learned judge in passing a sentence, which on the face of it seems to have been a very light one for a charge of fratricide. Without discussing the subject at

length, our enquiries have led us to the conclusion that the sentence upon this boy, (who by the way is under the age of fourteen, see Criminal Code, sec. 10), could not be bettered. His competency to "appreciate what is wrong" was largely dependent upon his home training, and to the want of this training may largely be ascribed the event which has brought such misery to all concerned. As to the sentence itself, anyone who carefully considers the various places of confinement and terms of imprisonment open to the learned judge in disposing of this case would probably arrive at the same conclusion that he did; and we are free to confess that we have no better suggestion to make. The judge had a very perplexing question to solve.]—Ed. C. L. J.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] LEAK *v.* CITY OF TORONTO. [April 20.
Public work—Land required—Land injuriously affected—Damages—Interest.

The City of Toronto, in 1891, passed a by-law for the construction of new iron and steel bridges across railway tracks on Dundas Street West. Having acquired by expropriation the land necessary for the purpose, the County Court Judge was appointed arbitrator to assess the value thereof and also the compensation to be given to the owners of other lands affected. L., one of the latter, was awarded \$8,000 and interest from the date of passing the by-law. On appeal by the city to a judge of the High Court in Chambers from the arbitrator's award, it was sent back for the arbitrator to state whether L.'s land was taken or only injuriously affected, with an intimation that if it was the latter no interest could be given. The award was then altered by striking out the amount for interest, and as altered was set aside by the Divisional Court (29 O.R., 685) but restored by the Court of Appeal. On appeal to the Supreme Court,

Held, affirming the judgment of the Court of Appeal, 26 A.R., 351, 35 C.L.J., 495, that interest in such case was not given by any statute, and the whole course of common law was opposed to it. The award, as altered, was therefore valid. Appeal dismissed with costs.

Du Vernet, for appellant. *Fullerton*, Q.C., and *Chisholm*, for respondent.

Ont.]

WATERS v. MANIGAULT.

[April 23]

Appeal—Jurisdiction—Title to land—Duty—Future rights—60 & 61 Vict., c. 34—Ditches and Watercourses Act.

W. applied for an injunction to restrain M. and others from proceeding to construct a ditch on land adjoining his own under an award which had been lost and which W. claimed was illegally obtained. He also claimed that the ditch would bring water on his land and injure it. His action was dismissed by the trial judge whose judgment was affirmed by the Court of Appeal. On appeal to the Supreme Court of Canada,

Held, that no question of title to real estate or any interest therein was involved so as to permit of an appeal under sub-s. (a) of 60 & 61 Vict., c. 34; that the charge upon W.'s land for a proportionate part of the cost of the ditch by reason of benefit was not the taking of a duty under sub-s. (d); and that no future rights of W. were affected; the case was not therefore, one in which an appeal would lie.

As the respondent might have taken exception to the jurisdiction in time to have saved the expense of printing the case and factum for the appeal, he was only allowed the costs of a motion to quash. Appeal quashed with costs.

Folinsbee, for appellant. *Stuart*, for respondent.

Ont.]

BANK OF TORONTO v. QUEBEC FIRE INS. CO.

[April 27.]

Fire insurance—Proof of loss—Increase of risk—Appeal—Questions of fact.

The John Eaton Co., of Toronto, whose premises were destroyed by fire in 1897, had insurance on the stock amounting to \$219,000, and actions were brought against five companies by the Bank of Toronto as assignees of the claims by an assignment after the loss. The companies defended on the grounds of false and fraudulent statements in the proofs of loss; that the fire was caused by the act of the insured; that the risk was increased by overstocking and heavy insurance; and that the Bank was not in law the assignee of the policies. Two of the causes were tried before FERGUSON, J., and the others by MEREDITH, C.J., all without a jury, and all resulted in a verdict for the Bank which was sustained by the Court of Appeal. On appeal to the Supreme Court of Canada:

Held, per STRONG, C.J., and TASCHEREAU, SEDGEWICK and KING, JJ., that the appeal depended almost entirely on questions of fact passed upon by two courts and for a second appellate court to reverse would be going in the teeth of many former decisions; that on the question of law that the proofs were defective, it being claimed that according to the evidence the accounts of stock were padded and the true value was much less than the insurance, the reasons given by the trial judge and judges in appeal were conclusive, namely that the explanation of the discrepancy had been

accepted by the trial judges; and that on the question of increase of risk, the Ontario courts had adopted too narrow a construction in holding that such increase could only be effected by direct dealing with the property insured, but there was no increase in fact.

MR. JUSTICE GWYNNE was of opinion that the whole case was open and that the court should pronounce upon it without considering themselves bound by the findings in the court below. Appeal dismissed with costs.

Aylesworth, Q.C., and *McCarthy* (*F. B. Osler* with them), for appellants. *S. H. Blake*, Q.C., and *Riddell*, Q.C. (*McKay* with them), for respondent.

Que.] STANDARD LIFE ASSURANCE CO. *v.* TRUDEAU. [May 4.

Appeal—Amount in dispute—Pleas—Incidental matters.

Poirier, for whose murder in the Province of Quebec his wife was hung, had two policies of insurance on his life for \$1,000 each. After the execution of Mrs. Poirier the insurance company brought an action to have the policies cancelled, and an appeal is now pending in the Supreme Court from a judgment against the company. In such action, Mrs. Trudeau, mother of Poirier, pending such action sued the company for \$1,000, half of the insurance, as one of the heirs of the insured, and obtained judgment in all the Quebec courts, the company having by its pleas raised the same issues as in the former action, and asked for cancellation of both policies. The company sought to appeal to the Supreme Court in this action also, and applied to the Court for approval of security which had been refused by the registrar.

Held, refusing such application, that the amount in dispute was only \$1,000; that the company could not by the pleas increase the demand so as to give jurisdiction to the Court.

Falconer, for the motion. *Fitzpatrick*, Q.C., Solicitor-General, contra.

Province of Ontario.

HIGH COURT OF JUSTICE.

Street, J.] REG. EX REL. BURNHAM *v.* HAGERMAN & BEAMISH. [March 5.

Municipal corporation—Aldermen—Qualification of—Title by possession—“Partly freehold and partly leasehold”—Meaning of.

In quo warranto proceedings under the Municipal Act it is permissible to join two or more persons in the one motion only when the ground of objection apply equally to both.

Where, therefore, the ground of objection was as to the qualification of two aldermen, which was separate and distinct, the joining of the two in one motion was held to be improper.

Property which had been in the undisputed possession of an elected candidate for fourteen years, he paying no rent nor giving any acknowledgment of title thereto, his title being admitted by the previous owner, who a few days after the election executed a conveyance thereof to him, is such as to constitute a sufficient qualification.

Held, also, that the qualification which by section 75 of the Municipal Act is allowed to be "partly freehold and partly leasehold" is satisfied by half the amount being freehold and half leasehold.

Masten, for relator. *H. J. Scott*, Q.C., for Hagerman. *Wood*, for defendant Beamish.

Boyd, C.]

MOSHER v. KEENAN.

[March 15.

Mercantile law—R. S. O. c. 150—Obtaining possession of goods—Not "entrusted"—Sale by—Recovery from purchaser—Estoppel.

A limited meaning is to be given to the term agent as used in R. S. C. c. 150. It is to be restricted to mercantile agents and does not include every one who may act and who has possession of the property. An agent within the act must be one who is *entrusted* with the possession as agent for sale in a mercantile transaction, or for a purpose connected with the sale of the property.

And an agent who has obtained possession of certain lumber from the master of a vessel without authority from the owner was

Held, not to have been *entrusted* with the possession, and the owner was entitled to recover the price against the purchaser although the latter had paid the agent.

J. M. Kilbourn, for plaintiff. *W. J. Hatton*, for defendant.

Divisional Court.] RYAN v. CORPORATION OF CARLETON PLACE. [March 15

Building contract—Erection of town and firehall—Reference—Division of questions of law and fact—Advisability of—Non proof of by-law—Waiver of—Plans and specifications—Incorporation into contract.

On a reference of an action, it is inadvisable unless the line between the questions of law and fact is clear and distinct, to divide up the reference by first directing the evidence to the question of legal liability leaving the quantum of damages, and all other matters to be afterwards disposed of.

An objection as to the non-proof of a by-law authorizing a contract for the erection of a town and fire hall, raised for the first time at the close of a reference of the action to recover a balance due under the contract, was

overruled where the contract was declared on and referred to in the statement of defence, and identified by the mayor on the application for the reference by the defendant and made part of the defendant's material, and treated as the contract throughout the whole reference, and upon which large sums of money had been paid under by-laws passed therefor.

An application for leave to amend so as to set up such objection was also refused.

Plans and specifications—the latter being divided under the headings "notes," "conditions" and "specifications," all bound up together and forming one document—drawn up for the erection of the said buildings, and, on the execution of the contract, and endorsement, initialled by the contractor and mayor, was made on the specifications stating that they were those referred to in the contract, must be read together as constituting one entire contract.

Watson, Q.C., and Allen, for plaintiffs. Aylesworth, Q.C., and Labelle, for defendants.

Divisional Court.]

COOLIDGE *v.* NELSON.

[March 17.

Will—Annuity—Agreement constituting charge on land—Necessity for registration—Notice—Registry Act.

The testator by his will directed his executors to pay his widow an annuity for the support and maintenance of one of his sons until he became of age; but, if there was not sufficient funds therefor, it was to be a charge on separate parcels of land severally devised to three of his other sons. There were sufficient funds in the executors' hands for the payment of this annuity, but by an agreement, for valuable consideration, made between the widow and the said devisees of the lands, it was agreed that the annuity should not be paid out of such moneys but should be a charge upon such lands, the intention being that such moneys should be kept in hand for the payment of a legacy to be paid to the first named son on his attaining his majority. A sale was subsequently made by one of the sons of the parcel of land devised to him, the purchaser being informed as to an agreement having been entered into but being at the same time told that it in no way affected the land, but merely created a personal obligation to pay the annuity, he made no further inquiry with regard to it.

Held, that the purchaser could not be deemed to have purchased the land with notice of the contents of the agreement so as to be affected thereby.

Notice at law and under the Registry Act discussed.

Shepley, Q.C., for appellants. Aylesworth, Q.C., contra.

Boyd, C.]

KING v. ROGERS.

[April 17.

Limitation of actions—Acknowledgment in writing—Revival of liability—Agent of executor—Letter to third person—Admissibility.

The executor of the will of one of the joint makers of a promissory note proved the will after the debt on the note as against the testator or his estate had become barred by the Statute of Limitations. The will directed that all the testator's just debts should be paid by his executors as soon as possible after his death. The executor, who lived out of Ontario, executed a power of attorney to the other joint maker of the note, who was primarily liable on it, and against whom it had been kept alive by payments, to enable him in Ontario "to do all things which might be legally requisite for the due proving and carrying out of the provisions" of the will—the executor having at this time no knowledge of the note.

Held, that a letter written by the surviving maker shortly after the execution of the power of attorney, even if in its terms sufficient, was not such an acknowledgment, within R.S.O. c. 146, s. 1, as would revive the liability after the expiry of six years; for there was no trust created by the will for the payment of debts, nor was there any legal obligation on the part of the executor to pay statute-barred debts, and the surviving maker was not an agent "duly authorized" to exercise the discretion which an executor has to pay such debts.

Three years' later the executor wrote to the holder of the note to the effect that the holder ought to look to the surviving maker for payment, as he was now doing well.

Held, that this, though some recognition of the debt, was not sufficient; there must be such a recognition as amounts to a promise or undertaking to pay.

Just before this action was brought to recover the amount of the note, the executor wrote to the plaintiff's solicitors, asking them not to take any further step till he could hear from the surviving maker; and to the latter he wrote: "The debt is owing, and they are anxious to get their estate settled up."

Held, insufficient as an acknowledgement, and that the letter to a third person—not the creditor—was [not admissible. *Goodman v. Beves*, 17 A.R. 528, followed.

D. E. Thomson, Q.C., and *W. N. Tilley*, for the plaintiffs. *F. E. Hodgins*, for the defendant Elford.

Boyd, C.]

LOGAN v. HERRING.

[May 5.

Costs—Will—Action to set aside—Failure of—Dismissal without costs—Costs out of estate—Administration.

In an action to set aside a will for undue influence by two of the defendants, one of whom was the executor, the attack failed, and the action

was dismissed, but without costs as to these two defendants, there being circumstances which might, unexplained, appear to be suspicious.

The other defendants, two pecuniary legatees under the attacked will, and a religious society to whom land was devised by it, submitted their rights to the Court, but appeared by counsel at the trial, and joined in resisting the plaintiffs' claim.

Held, that these defendants were in the position of "interveners" under the English procedure, and were not entitled to costs out of the estate.

Held, also, that they were not entitled to costs against the plaintiffs.

Seem, that they would be entitled to compensation in the administration of the estate.

Watson, Q.C., and *W. D. Swayze*, for plaintiffs. *E. F. B. Johnston*, Q.C., *Kirwan Martin* and *M. S. Mercer*, for the various defendants.

Rose, J.]

EVANS v. CHANDLER.

[May 7.

Costs—Scale of—Jurisdiction of County Courts—Ascertainment of amount—Price of goods sold.

In an action for the price of goods sold, in which the plaintiff recovered \$290, it was contended that that amount was ascertained by the act of the parties, and therefore within the jurisdiction of the County Courts, because the goods were sold according to a price list agreed to, and therefore the amount was ascertainable by a simple computation.

Held not so. *Thompson v. Pearson*, 18 P.R. 420, distinguished.

W. R. Smythe, for plaintiff. *D. E. Thomson*, Q.C., for defendants.

Rose, J.]

PIGOTT v. EMPLOYERS' LIABILITY ASSURANCE CORPORATION.

[May 9.

Insurance—Employer's liability contract—Alteration after execution—Foreign company—Local agent—Authority—Notice.

A local agent of an English insurance company, without authority from any one, upon the request of the assured, and after some correspondence with the chief agent for the company in Ontario as to other changes which had been refused, to the knowledge of the assured, altered an employer's liability policy which had been sent to him for delivery to the assured by making it comprehend the workmen at a place other than those named in the policy, and then handed it to the assured, who paid him the premium. He then sent the premium to the chief agent for Ontario, and advised him at the same time of the alteration made. The power to make any change in the policy did not rest in the local agents, nor in the chief agent for Ontario, but only in the manager and attorney for Canada, who was not notified of the alteration.

Held, that the company could not be held to have authorized the alteration and were not found by the contract as altered.

Osler, Q.C., and *Bruce*, Q.C., for plaintiffs. *Aylesworth*, Q.C., for defendants.

Meredith, C.J., MacMahon, J.]

[May 10.

SAWYER v. ROBERTSON.

Jury notice—Exclusive jurisdiction of Chancery—R. S. O. c. 51, s. 103—Legal and equitable issues—Rule 551.

The plaintiff's claim was to enforce a charge against the defendant's lands and for a personal order or judgment for immediate payment of the sum for which they asserted the charge.

Held, not such an action as would have been, before the Administration of Justice Act of 1873, within the exclusive jurisdiction of the Court of Chancery and within s. 103 of the Judicature Act, R.S.O. c. 51.

There being, therefore, legal and equitable issues raised, and notice for a jury given, Rule 551 applied, and the action should be entered for trial at a jury sittings.

Kirwan Martin, for plaintiffs. *Glyn Osler*, for defendant.

Meredith, C.J.]

[May 10.

MACDONALD v. GRAND TRUNK R. W. CO.

Railway company—Carriage of goods—Condition limiting liability for loss—51 Vict., c. 29 (D.)—Canadian company—Part of line in foreign country.

The Railway Act of Canada is not applicable to a railway situate in a foreign country, though operated by a company incorporated by or under the authority of the Parliament of Canada.

Therefore where goods shipped from Scotland to be delivered at Portland, Maine, to the Grand Trunk Railway Company, and by that company to be forwarded thence to the plaintiffs at Toronto, were destroyed by fire on the line of that company in New Hampshire, by negligence from which they were protected from liability by the terms of the contract for carriage:—

Held, that the provisions of s. 246 of 51 Vict., c. 29 (D.) were not applicable to the defendants' contract; and an action to recover damages for the loss of the goods failed.

Aylesworth, Q.C., and *Spencer Love*, for plaintiffs. *Wallace Nesbitt*, Q.C., for defendants.

Meredith, C. J., MacMahon, J.]

[May 14.

WHITEWOOD v. WHITEWOOD.

Payment into Court—Infant's fund—Trustee—Discretion—Costs—Taxation—Interlocutory motion—Affidavits.

The defendant, having in her hands a fund to the benefit of which the plaintiff, an infant, was entitled, asserted that, by the terms of the trust upon which she held it, she had a discretion as to the application of it for the benefit of the plaintiff. She nevertheless paid the money into a bank to her own credit as trustee for the plaintiff and agreed that she would not use it except for his benefit, and would pay it to him at majority.

Held, that the defendant was a mere trustee for the plaintiff, without the discretion which she contended for; and a summary order, (made before delivery of statement of claim in an action to recover the fund and for an injunction) requiring the defendant to pay the fund into Court, and thereupon perpetually staying the action, was affirmed.

In re Humphries, Mortimer v. Humphries, 18 P.R. 289, approved.

Where an interlocutory motion was dismissed upon preliminary objections;—

Held, that the taxing officer had a discretion to disallow to the party opposing it the costs of affidavits filed in answer to it.

Eyre, for plaintiff. *Carey*, for defendant.

Boyd, C., Robertson, J., Meredith, J.]

[May 14.

WAKEFIELD v. WAKEFIELD.

Tenant for life—Renewal of lease—Carrying on business on premises—Profits—Account.

A widow was entitled under her husband's will to the use and enjoyment of all his property during her life. It was conceded that she was entitled to the enjoyment in specie of the personal estate. The testator owned a brick-field on leasehold land, which was a going concern at the time of his death. This and the plant in connection therewith the tenant for life took possession of, and went on with the working of it. She put other assets of the estate into this business and extended it, and when she died it was still a going concern. At the expiration of the term of her husband's lease, she obtained a new one, covering a larger area of land.

Held, MEREDITH, J., dissenting, that the widow, having elected to carry on the business on these premises, did so for the ultimate benefit of the estate. She was entitled to all the income, earnings and profits derivable therefrom each year, in so far as she applied them to the maintenance of the family, or in the acquisition of other property, or in the paying off of mortgages; but whatever profits went into the business to increase it, and whatever plant, stock, and belongings of the business remained on the

premises or elsewhere at her death, became the property of the husband's estate.

An account against her executor was directed, and the scope of the inquiry defined.

Murphy, Q.C., and R. G. Smyth, for plaintiff. Coatsworth and F.E. Hodgins, for defendant, T. Wakefield. A. J. Boyd, for infant defendants.

Boyd, C., Robertson, J., Meredith, J.]

[May 14.

CRAIG v. CROMWELL.

Mechanics' lien—"Notice in writing" to owner—Letter—R.S.O.

c. 153, s. 11, sub-s. 2.

The claimants of a mechanics' lien for materials wrote to the owner a letter asking him, when making a payment to the contractor "on the Lisgar Street Buildings"—the property on which the lien was asserted—to "see that a cheque for at least \$400 is made payable to us on account of brick delivered, as our account is considerably over \$700, and we shall be obliged to register a lien if a payment is not made to-day."

Held, MEREDITH, J., dissenting, a sufficient "notice in writing" of their lien, under sub-s. 2 of s. 11 of the Mechanics' and Wage-Earners' Lien Act, R.S.O. c. 153.

Thomson, Q.C., and R. B. Matheson, for claimants. Arnoldi, Q.C. for owner.

Osler, J.A.]

APPLEBY v. TURNER.

[May 15.

Leave to appeal—Order setting aside judgment—Grounds of plausible attack—Statement of claim—Service by posting—Irregularity—Delay—Discretion.

A Divisional Court of the High Court having set aside a judgment signed by the plaintiffs for default of defence in an action on a bond (ante p. 313), upon two grounds, viz., (1) that a motion for judgment was necessary, and (2) that the statement of claim had never been legally served upon the defendants, the posting up thereof in the office not being service because of the omission to file an affidavit of service of the writ of summons before doing so;

Held, that leave to appeal should not be granted unless the plaintiffs could make a plausible attack upon both grounds, for if only one were demolished, the other would support the judgment, and leave to appeal is not given merely to settle a point of practice the decision of which would not affect the judgment complained of.

And in this case the service of the statement of claim could not be supported, having regard to Rule 574, and it was in the discretion of the Court below to give effect to the objection to its regularity, notwithstanding the defendants' delay in moving against the judgment.

W. E. Middleton, for plaintiffs. Hislop, for defendants.

Meredith, C.J.,

SEGSWORTH v. MCKINNON.

[May 15.]

Venue—Writ of Summons—Indorsement—Election—Rules 138 (2), 529.

Where in the special indorsement of his writ of summons the plaintiff names a place of trial, he is not at liberty to change by naming another place in his statement of claim. Rule 529 must be read subject to the provision of Rule 138 (2).

R. S. Robertson, for plaintiff. *W. H. Blake*, for defendant.

COUNTY COURT OF THE COUNTY OF YORK.

TAIT v. JACKSON.

Municipal law — Setting out fire — Violation of fire by-law—Notice—Negligence—Burden of proof.

By Municipal Act, R.S.O. c. 223, s. 532, sub-s. 16, by-laws may be passed by the Council "for regulating the times during which stumps, wood, logs, trees, brush, straw, shavings, or refuse, may be set on fire or burned in the open air, and for prescribing precautions to be observed during such times; and for preventing such fires from being kindled at other times;" and by s. 702, sub-s. 1 (b), the right to impose penalties is given for violation of any of these by-laws. In pursuance of this power the Municipality of Scarborough passed a by-law enacting that no fire was to be set out in the Township between July 1 and September 15, nor at any other time until after eight days' notice had been given to the owner or occupant of the adjoining property of the intention of any person to set out such fire, and it was also provided that any person contravening the by-law should be liable to a fine of not less than \$2 nor more than \$50. The defendant in clearing his land set out a fire, which resulted in the burning of a quantity of fire wood and timber of the plaintiff which was piled upon the public highway opposite the defendant's land. No notice was given under the by-law. Action having been brought by the plaintiff alleging negligence it was

Held—1. That the omission to give the notice under the by-law did not interfere with or deprive the parties of their common law rights, but that such omission only had the effect of rendering the defaulting party liable to the penalty imposed by the by-law.

2. That the omission to give the above notice was evidence of negligence and shifted the burden of proof as to negligence from the plaintiff to the defendant.

[TORONTO, April 18.—MORSON, J.J.]

This was an action brought by a farmer of the Township of Scarborough, in the County of York, to recover from another farmer of said Township, the value of a quantity of firewood and other timber cut into logs and piled upon the public highway opposite the defendant's land in two separate piles, called the north and south piles, the property of the plaintiff which had, as was alleged, been destroyed by fire set out by the defendant for the purpose of clearing his land. The plaintiff alleged that the fire was unlawful, as being contrary to the provisions of the by-law above referred to, passed December 16, 1890, still in force. He further alleged that the defendant did not use due care to prevent the fire from spreading, but carelessly permitted it to spread and burn for a long time.

The defendant admitted the burning of the property of the plaintiff, but said that the fire was set out in the usual course of husbandry and without carelessness or negligence on his part, and if it escaped and did the damage complained of, it was through no negligence of his. He further alleged that the by-law had no application to this case; that the plaintiff was not the owner or occupier of adjoining property within its meaning, and was not, therefore, entitled to notice. He also alleged that the plaintiff was guilty of contributory negligence in not saving his property, after knowledge and notification that it was in danger.

J. B. Clarke, Q.C., for the plaintiff. Du Vernet, for defendant.

MORSON, J.J.—On the evidence I have come to the conclusion that the defendant knew of the plaintiff's property being on the highway opposite his property, that the fire set out by him was set out in the early part of June in the ordinary course of husbandry; that no fire was set out by him in the month of July; that he reasonably and honestly thought the fire had been extinguished in June by the rain and by burning out, and that he was not aware of any fire or smoke upon his premises until the 30th July, the day on which the north pile was destroyed. It is quite clear, however, that in this he must have been mistaken, for there seems no reason to doubt that the fire had been smouldering from the time when defendant thought it was out up to the 30th July, when it broke out again, but not to the knowledge of the defendant. I do not find any negligence on his part in not knowing of the smouldering, under the circumstances. That on the 30th July in consequence of a very high wind suddenly arising it blazed up, and as a result the plaintiff's north pile was destroyed. About a week later the south pile was also destroyed, and during all that week the fire was burning to the knowledge of the defendant, who took no steps, so far as his evidence shows, to control it or put it out, and who was aware that the south pile had not been removed out of danger. The plaintiff had knowledge that the fire was raging, as he termed it, all that week and that he, having his harvest to attend to, which he deemed the most important, took no steps to remove the south pile which was destroyed; that the defendant did not give the notice required by the by-law before setting the fire out. The plaintiff does not allege there was any negligence in setting out the fire, which he admits was quite proper in the ordinary course of husbandry in the month of June. He does not show any particular act of negligence down to the 30th July. He only alleges that fire was set out on the 13th July and that smoke was seen rising during the months of July and August. This in itself, apart from the by-law, in my opinion is not evidence of negligence. He does not state that the fire was not under control nor that there was any danger in it, nor that it must have been smouldering. It might be, however, that the setting out of fire on the 13th July, a month which was very dry, is some evidence of negligence, but the defendant has answered this by showing to my satisfaction that he did not set out any fire on that date.

Now, at common law it was the defendant's right to properly set out fire on his own land for the necessary purposes of husbandry, provided he or his servants managed it with due care, and if he did and damage was nevertheless done, he was not responsible on the ground that every man has a right to use his land in the way he thinks best, but in using fire, which is a dangerous substance, he must use proper precautions to prevent it extending to his neighbors. He must exercise the care and diligence which a prudent man would observe in his own affairs and which a prudent and conscientious man will observe as to the interests of his neighbors, but this amount of care varies, of course, according to circumstances : *Dean v. McCarty*, 2 U.C.R. 448 ; *Furlong v. Carroll*, 7 A.R. 161.

The plaintiff, however, while admitting this to be the law and contending the defendant was negligent, further contends that because of the non-observance of the by-law in not giving notice, the setting out of the fire which was otherwise lawful, was unlawful, and, therefore, the defendant is liable in any event, whether negligent or not, and refers to *Fletcher v. Rylands*, L.R. 1 Ex. 265, in support of this contention. This case decides that where one for his own purposes brings upon his land and collects and keeps there anything likely to do mischief, if it escapes, is prima facie answerable for all the damage which is the natural consequence of its escape.

Ry the Municipal Act, R.S.O. c. 223, s. 542, sub-s. 16, by-laws may be passed by the Councils of Municipalities "for regulating the times during which stumps, wood, logs, trees, brush, straw, shavings, or refuse, may be set on fire or burned in the open air, and for prescribing precautions to be observed during such times ; and from preventing such fires from being kindled at other times," and by s. 479, sub-s. 17, the right to impose penalties is given for violation of any of these by-laws.

In pursuance of this statutory power, the Municipal Council of the Township of Scarborough passed the by-law in question, No. 516, which enacts, "(1). That from and after the passing of this by-law it shall not be lawful for any person or persons to set on fire or burn any stumps, wood, logs, trees, brush, straw, shavings, or other refuse, in the open air within the Township of Scarborough at any time between the 1st day of July and the 15th day of September in any year ; nor at any other time or times during the year until after eight days' notice has been given to the owner or occupant of the adjoining property which might be injured thereby, of the intention of any person to set fire to or burn such material.

"(2). That any person contravening the provisions of this by-law shall be liable, upon conviction, to a fine of not less than two dollars nor more than fifty dollars, to be recovered before any Justice of the Peace for the County of York, to be collected by distress and sale of the goods and chattels of the offender," etc., etc.

By this s. 479, sub-s. 17, no power is given municipalities to interfere with the common law rights of parties who come within the by-laws, either

to increase or lessen them, or to take them away altogether, only the power to impose a penalty and nothing more. If the Legislature intended that the non-observance of the by-law took away the common law right of defence of no negligence as contended for by Mr. Clarke, they would have expressly said so, but not having done so, it is not for me to do so. It is a well-known rule applicable to all by-laws, that they must be reasonably clear and unequivocal in their language in order to vary or take away common law rights, and in my opinion this by-law does neither. It only says you must not set out fire in certain months of the year without first giving notice, and if you do you must pay the penalty imposed by it. It cannot make the setting out unlawful without the notice, for if it did I think it would be clearly *ultra vires*, for power is only given to regulate the times during which fire may be set out, not to prevent it altogether. It only adds to what is a lawful act in setting out for the purpose of husbandry, the condition of first giving notice, under a penalty for its omission. From a perusal of the case of *Lamb v. Sloan*, 94 North Carolina Reports 534, it appears that the Legislature of that State at all events thought it necessary, just as I do, to enact specially, in addition to the pecuniary penalty, that anyone violating the statute should be liable to any person injured in an action. The section of that Act, which is very similar to this by-law, is as follows:—

“No person shall set fire to any woods except it be his own property, nor in that case without first giving notice to all persons owning lands adjoining to the woodlands intended to be fired, at least two days before the firing of such woods, and also take effectual care to extinguish such fire before it shall reach any vacant or patented lands near to or adjoining the lands so fired. Every person wilfully offending against the preceding section shall for such offence forfeit and pay to any person who shall sue for the same the sum of \$50 and be liable to any one injured in an action, and shall moreover be guilty of a misdemeanor.”

The action was brought under this statute against the defendant, who set out the fire without giving the notice. The learned Judge in his judgment, amongst other things, says: “Having set fire to his woods, without having given the plaintiff at least two days’ notice thereof, he made himself liable for such damages as the latter sustained by the spread of the fire to and upon the adjoining woodland. Reasonable diligence on the part of the defendant in his efforts to keep the fire under control would not relieve him from this cause of action. He made himself responsible at all events for the harm his fire did the plaintiff. The very purpose of the statute was to give the plaintiff a right of action in which the defendant could not defend himself successfully by showing reasonable care and diligence on his part as he might do if the plaintiff had sued for a breach of his common law right, otherwise the statutory right would be nugatory.” In my opinion then, the by-law does not have the effect contended for by Mr. Clarke, and coming to this conclusion it becomes unnecessary for me to consider the

point raised by the defendant, that the plaintiff was not the adjoining owner of property within the meaning of the by-law so as to entitle him to notice. I think, however, the only effect the failure to give notice has, is that it is sufficient evidence of negligence so as to make it unnecessary for the plaintiff to prove it, which he otherwise would have to do, and puts the onus upon the defendant of the proof of no negligence.

I have not been referred to any cases directly on the point and can find none, but in notes to s. 489, sub-s. 24 of Harrison's Municipal Manual, I find the following: "The kindling of a fire in a municipality where such a by-law exists at a time other than prescribed by the by-law or in disregard of the precautions made necessary by the by-law, would be strong if not conclusive evidence of negligence." It is to be noticed that it is not said that the defendant would be liable at all events and prevented from setting up his common law defence of having used due care and caution. It seems to me if this were the effect of the non-observance of the by-law, in addition to being evidence of negligence, it would have been referred to by the late learned author, who would not have overlooked a point so important.

The defendant, then, in my opinion, for the reasons I have stated, is not by reason of his failure to give the notice under the by-law, brought within the principle of *Fletcher v. Rylands*, and is therefore entitled to defend himself by satisfying the onus that is upon him, as a result of his failure to give notice and show that the destruction of the plaintiff's property was not the result of his, the defendant's negligence, so far as the north pile is concerned. I think he has satisfied this onus. The conclusion, on the evidence, that I have come to, compels me to find, that there was no negligence on the part of the defendant, and that the *causa causans* was the sudden rising of the very high wind which the defendant was not bound to anticipate, and which caused the smouldering fire to suddenly blaze up to the extent it did, carrying it across to the plaintiff's north pile and destroying it. Under these circumstances the defendant is not liable: *Buchanan v. Young*, 23 U.C.C.P. 101.

As to the south pile, I think I must find that the defendant was negligent. [The learned Judge here commented on the evidence as to the fire at the south pile and expressed the opinion that because the defendant took no steps to extinguish the fire, but remained inactive, there was negligence on his part; but he also held that the plaintiff was guilty of contributory negligence because he took no steps to remove the south pile to a place of safety. Not having done so, he was as much to blame for its destruction as the defendant.]

For the reasons that I have stated the plaintiff cannot, in my opinion, recover for either the north or south pile, and I therefore dismiss his action with costs.

FIRST DIVISION COURT OF THE COUNTY OF YORK.

Morson, J.J.] LAW SOCIETY OF UPPER CANADA v. S. R. CLARKE. [May 5.

Law Society—Solicitor—Annual fees—Recovery by action.

The defendant was alleged to have been practising as a barrister and solicitor without having taken out his annual certificates. An action being brought to recover the same with fines for default it was

Held, 1. The taking out of annual certificates by solicitors is voluntary and not compulsory.

2. A solicitor practising without having taken out his certificate does not give a right to the Law Society to sue for the fees, but only renders the solicitor liable to the penalties provided by the rules of the Law Society or the Solicitors' Act.

3. The Law Society could not recover under the usual bond given when entering as a student as that only covers cases when fees are due, and no certificate being taken out, fees were not due within the condition of the bond.

Walter Read, for plaintiff. Defendant in person.

ASSESSMENT CASES.

Ketchum, Co.J.]

IN RE BURNHAM AND THE TOWNSHIP OF HAMILTON.

Assessment of toll roads—Assessment Act, s. 32.

J. D. Roddick, assessor of Hamilton township, for the year 1899, assessed certain portions of toll roads running through the township and the whole of another toll road in said township at \$11400, following the assessment of previous years, though in the assessor's judgment the amount was too low. Mr. Burnham, the president of the road companies, appealed to the Township Court of Revision, which confirmed the assessment. He thereupon appealed to the county judge and the assessor appealed to have the assessment increased. The case turned upon the interpretation of s. 32 of the Assessment Act, which directs that such roads shall be assessed as real estate in the municipality in which they are situate; and that in making the assessment the assessor shall take into consideration the value of (1) the land occupied by the road, (2) the materials employed in the superstructure, (3) toll houses, buildings and gates on the road, (4) quarries and gravel pits and roads to and from such places and used in connection therewith.

KETCHUM, Co. J., after hearing evidence exhaustively, and argument of counsel, reserved judgment and subsequently delivered a considered judgment, in which he alluded to the fact that the section appeared in the statutes of 1890 but that no reported case upon its construction

could be found. After tracing the history of toll road legislation down to the present time he decided against the contention of the road companies that the width of side roads crossing the toll roads should not be computed in arriving at the assessable area, but that, on the other hand, these gravel roads do not "occupy" and are not assessable for the whole of the width of the original highways upon which they are constructed. That there is nothing in any of the Acts of incorporation which vests in the road company the whole or any part of the original highways upon and over which the gravel roads were constructed; the soil and freehold of the highways remain in the Crown, and are exempt from taxation; the right of the public to use the original highways remains as it was before the gravel roads were made, subject to the privileges granted to the road companies: *Reg. v. Davis*, 35 U.C.R. 107; *Reg. v. Davis*, 24 U.C.C.P. 575; and see also *In re Hamilton and Court of Revision of Biddulph*, 13 C.L.J. 18; also ss. 147, 148, 149 of the present Road Companies' Act (R.S.O. c. 193). What is vested in each of these companies is the road that such company was authorized to construct; in ascertaining the width, the ditches on each side of the gravel should be included. As to the value of the materials, the case of *Bell Telephone Company and City of Hamilton*, 25 A.R. 351, applies, and the materials must be valued not as forming part of a going concern, in which the franchise would be a material element, but as materials to be separate and removed from the road, for sale in the state and condition in which they now are, without considering the cost of the labor involved in the construction of the road.

Frank M. Field, for Hamilton township and the assessor. *W. F. Kerr*, for the road companies.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] *MCLEOD v. THE INSURANCE COMPANIES.* [Feb. 7.
Practice and procedure—Commission to take evidence abroad—Settling aside—Discretion of judge reviewed.

The granting of a commission to take evidence is in the discretion of the judge to whom the application is made, but where strong reasons are shown to the Court of Appeal why the commission should not have been granted, such as failure to exercise due diligence on the part of the party applying, or unreasonable delay caused to the opposite party, the discretion will be reviewed.

In a case which had been twice tried, and was coming on for a third trial, where it appeared that two commissions had already been obtained,

and evidence taken under each; that the facts sought to be established had been previously known to or their existence suspected by the party applying; where it was not alleged that the evidence sought to be obtained was material and necessary and that the party could not safely proceed to trial without it, but only that the examination would be effectual; and where no defence based upon the fact sought to be established had been set up, and no application had been made to amend the pleadings so as to enable it to be set up.

Held, that the order for the commission must be set aside with costs.

W. B. A. Ritchie, Q.C., for appellant. *R. E. Harris*, Q.C., for respondent.

Full Court.]

CUMMINGS v. PICKLES.

[Feb. 7.

Practice—Notice of trial—Waiver of—Cause entered on docket improperly—Action dismissed for want of prosecution—O. 34, R. 23—Appeal from—Order—Costs.

Defendant after giving notice of trial accepted service of a replication pleaded by plaintiff, without making any objection thereto.

Held, that he thereby waived his notice and admitted that the cause was not at issue when it was given.

Where defendant subsequently gave another notice, which was admittedly defective, and entered the cause on the docket of causes for trial,

Held, that the cause was improperly entered and that a motion to set aside the notice and to strike the cause off the docket should have prevailed.

Plaintiff did not appear at the time at which the cause was entered for trial, and an order was obtained by plaintiff under O. 34, R. 23, dismissing the action for want of prosecution.

Held, that there was an appeal from the order so made, and that plaintiff was not limited to an application under the order to have the judgment set aside.

Per MEAGHER, J. (dissenting). There should be no costs, as the difficulty appeared to have arisen from a misunderstanding between solicitors.

J. A. McLean, Q. C., for appellant. *J. J. Ritchie*, Q. C., for respondent.

Full Court.]

HARRINGTON v. PETERS.

[Feb. 7.

Statute—Construction—Act changing form of procedure retroactive—Barrister and solicitor—Rendering signed bill.

By the Acts of 1899, c. 27, s. 69, to amend and consolidate the Acts relating to barristers and solicitors, passed March 30th, 1899, it was enacted that "No action shall be brought for the recovery of fees, costs, charges,

etc., by a barrister or solicitor as such until one month after the bill therefor signed by such barrister or solicitor has been delivered to the party to be charged," etc. By s. 81 it was provided that the Act should not come into force until the first day of July, 1899. On May 4th, 1899, plaintiffs caused a writ to be issued for the recovery of an amount claimed to be due them from defendants for professional services and moneys expended by plaintiffs as solicitors of defendants upon their retainer and at their request. The statute was pleaded and it was agreed that no bill had been delivered as therein provided.

Held, that the delivery of a signed bill in accordance with the provisions of s. 69 and proof thereof upon the trial involved a matter of procedure only, or, at most, a mere alteration in the matter of proof necessary to sustain the action, and therefore was within the rule stated by BLACKBURN, J, in *Gardner v. Lucas*, 3 App. Cas. 603, that alterations in the form of procedure are always retrospective unless there is some good reason or other why they should not be.

Held, also, that the enactment being a remedial one should receive a liberal construction.

A. Drysdale, Q.C., and *H. Mellish*, for appellants. *W. B. A. Ritchie*, Q.C., for respondents.

Full Court.]

BOAK v. HIGGINS.

[Feb. 7.

Practice—Discontinuance after plea—Leave of court or judge—Words "proceeding in action," O. 26, R. 1—Receiver—Order for, set aside with costs.

Where defendants were added by order of court and appeared and pleaded,

Held, that plaintiffs had not the right, except by leave of the court or a judge, to discontinue as against such defendants, especially where defendants claimed a specific right in the property in question, which right would be affected by the action.

Where an agreement had been entered into under which defendants' solicitor was permitted to withdraw the defence pleaded by him and to prepare and deliver a new defence,

Held, that this was another "proceeding in the action" after delivery of the defence, which, under O. 26, R. 1, precluded plaintiffs from discontinuing without leave of the court or a judge.

Held, also, that an order for the appointment of a receiver made while the first defence was on the record and had not been abandoned, and of which neither the defendant F. nor his solicitor had notice, was irregularly made and must be set aside with costs.

C. S. Harrington, Q.C., and *C. P. Fullerton*, for appellant. *F. T. Congdon*, for respondent.

Full Court.] McDONALD v. BROAD COVE COAL CO. [Feb. 7.
Goods sold and delivered—Authority of agent to purchase—Ratification—Evidence.

In an action brought by plaintiff against the defendant company for the price of certain articles alleged to have been sold by him to the company for use in connection with the construction of their line of railway it was shown that the articles sued for were sold to H., who acted as manager for defendant and were used by him in connection with the building of the road. It was also shown that plaintiff was employed by H. to do certain work on the road, and that this act of H. was recognized and ratified by the company, who paid plaintiff for the services rendered by him.

Held, that there was sufficient evidence to support a finding that the sale of the articles sued for was made to the company and not to H. individually.

D. McNeill, Q.C., for appellant. *C. E. Gregory*, for respondent.

Province of New Brunswick.

SUPREME COURT.

RUNCIMAN v. STAR LINE STEAMSHIP CO.

Negligence causing death.

The note of this case on p. 317 would more correctly read as follows:—

“*Held* on motion for a nonsuit on the ground that there was no sufficient pecuniary loss to the plaintiff, etc.”

Province of Manitoba.

QUEEN'S BENCH.

Killam, C.J.] ROBOCK v. PETERS. [April 11.

Mechanics' liens—Mechanics' and Wage Earners' Lien Act, 1898—Priorities between lienholders and mortgagees—Notice of lien—Subrogation of rights of unpaid vendor in favor of mortgagee paying him off—Practice—Defects in the statements of lien registered.

Trial of an action under the “Mechanics' and Wage Earners' Lien Act, 1898,” 61 Vict., c. 29, which was not defended by the debtor, but at which it was necessary to determine the respective rights and priorities as between the plaintiff, whose claim was for work and labor, another lien holder whose claim was for lumber and other materials supplied at different dates, and

several mortgagees. These parties had been served, pursuant to s. 32 and s. 27 (2) of the Act, with notice of the trial, but had not otherwise been made parties to the action.

Sec. 31 of the Act provides for a special trial of such an action before a judge who disposes of all questions between all parties and persons on whom notice of trial has been served, without a reference to the Master, and has to "embody all the results in the judgment." By s. 4, sub-s. (1) the lien arises by virtue of the performance of the work, or a furnishing of the materials, and by sub-s. (2) "such lien upon registration . . . shall arise and take effect from the date of the commencement of such work or service or from the placing of such materials as against the purchasers, chargees or mortgagees under instruments registered or unregistered." Sub-s. (3) of s. 5 provides that, in case the land be encumbered by a mortgage or other charge, existing or created before the commencement of the work or of the placing of the materials or machinery upon the land, such mortgage or other charge shall have priority over a lien to the extent only of the actual value of such land at the time the improvements were commenced. By s. 2, the word "owner" extends to all persons claiming under the person who ordered the work done or materials provided, and "whose rights are acquired after the work or service is commenced, or the materials furnished have been commenced to be furnished." By s. 19, when a lien is registered under the Act, the person entitled shall be deemed a purchaser pro tanto, and within the provisions of the Registry Act, "but, except as herein otherwise provided, the Registry Act shall not apply to any lien arising under this Act." And s. 11 is as follows: "The lien created by this Act shall have priority over . . . all payments or advances made on account of any conveyance or mortgage after notice in writing of such lien to the person making such payments or after registration of such lien as hereinafter provided."

Held, 1. Although an account for materials supplied may consist of items for different lots supplied at different dates on separate and distinct orders, the lien filed within the required time after the delivery of the last lot will be good to cover all the orders if given in pursuance of a general arrangement previously entered into. *Morris v. Tharle*, 24 O. R. 159, followed. *Chadwick v. Hunter*, 1 M. R. 39, not followed.

2. The claims of subsequent incumbrancers and other lien holders may be disposed of at the trial without their being made parties to the action, and although the notice of trial has been served after the time limited for bringing the action: *Cole v. Hall*, 13 P. R. 100.

3. The lien holder who registers his lien in time has priority from the date of the commencement of the work or from the placing of the materials over every conveyance, mortgage or charge made thereafter, although registered first, and such priority is not affected by s. 11 which applies only to payments or advances made subsequently to the taking effect of the lien under conveyances or mortgages otherwise having priority.

4. The effect of s. 17 of the Act is that only substantial compliance with the directions as to the contents of the claim and the registration of it is required, and no failure in such compliance, in however substantial a degree, is to invalidate the lien unless some other party is prejudiced thereby, and then only to the extent to which he is thereby prejudiced.

5. The lien for materials supplied as against a mortgage has priority over the mortgage only to the extent of the materials actually placed on the ground before the mortgage money was advanced.

6. Under s. 11, if a mortgagee has notice in writing of the fact that there is an indebtedness for which a lien may be claimed, that is, *prima facie* notice of the lien itself, and he cannot claim priority for money advanced after such notice.

7. The first mortgagee having applied his last advance in payment of the purchase money of the lots to the unpaid vendor who then conveyed the land in fee to the defendant "owner," and having thus secured the title to the property, claimed to be entitled to be subrogated to the position of the original vendor in respect of such purchase money; but, having had actual notice of one of the liens and constructive notice of the other before making this payment, following *Paity v. Wright*, 1 Sim. & St. 369, 3 Russ. 142, it was held that he could not have priority over either lien holder for such advance. *Brown v. McLean*, 18 O.R. 533, and *Abell v. Morrison*, 19 O.R. 672, distinguished.

Crawford, Q.C., for plaintiff. *Huggard*, for defendant. *Phippen*, *Perdue* and *McPherson*, for the other parties respectively.

Killam, C. J.]

SHRIMPTON v. WINNIPEG.

[April 23.]

Municipality—Injunction against carrying out illegal contract—Ultra vires—Costs—Municipal Act, R.S.M. c. 100, s. 396.

This was a motion for an injunction to prevent the City of Winnipeg from entering into a contract which was in the nature of an agreement of purchase of certain land to be paid for in five yearly instalments, which the city council had by resolution approved of, notwithstanding the provisions of s. 396 of The Municipal Act, R.S.M. c. 100.

After several adjournments of the motion, and before it finally came on for hearing, a new arrangement was entered into so far varying the original proposition that the injunction was not pressed on the argument, and the only question argued was as to the disposition of the costs.

It was contended on behalf of the defendants that the agreement if entered into would have been wholly void, and no injunction to prohibit it was necessary; also, that an individual ratepayer could not sue for an injunction.

Held, following *Hoole v. The Great Western Railway Co.*, L.R. 3 Ch. 262, that a suit for an injunction was proper in such a case, and that the

defendants should pay the costs. It is not necessary that such a suit should be brought in the name of the Attorney-General, notwithstanding what is stated in *Dillon on Corporations* at par. 910. See paragraphs 911-922, and the following Ontario Cases: *Wilkie v. Clinton*, 18 Gr. 557; *Helm v. Port Hope*, 22 Gr. 273; *Smith v. Raleigh*, 3 O.R. 305; and *Wallace v. Orangeville*, 5 O.R. 37.

Tupper, Q.C., and *Phippen*, for plaintiff. *Ewart*, Q.C., and *Campbell*, for defendants.

Province of British Columbia.

SUPREME COURT.

Court of Criminal Appeal.]

[Feb. 9.]

REGINA v. PETRIE.

Criminal law—Common gaming house—Black jack—Criminal Code, s. 196.

Prisoner was lessee of a room to which the public had free access and in which several people congregated and played the game called black jack. There was no constant dealer (banker) and the lessee got no benefit. The dealer (who is chosen on commencing by cutting the cards) has an advantage, and as a rule, can keep the deal five or six minutes. Prisoner was convicted under s. 196 of the Code, of keeping a common gaming house and the Court of Criminal Appeal confirmed the conviction, holding that as the dealer had an advantage over the other players, the game came under the provisions of s. 196.

Wilson, Q.C., and *Brydone-Jack*, for Crown. *Davis*, Q.C., for prisoner.

Martin, J.]

FEIGENBAUM v. JACKSON.

[March 8.]

Practice—Privilege—Photographs.

Summons for inspection. The action was for an injunction and for damages against defendants who had erected a building next to plaintiff's building and thereby shut out free access of light. In the affidavit of documents filed by defendants they objected to produce some photographs showing the buildings occupied by all the parties before the erection of the addition complained of, on the ground that they were privileged.

Held, dismissing the summons, that photographs sworn to be part of the materials of the defendant's evidence in the action are privileged from production.

Barnard, for the summons. *Bradburn*, contra.

Martin, J.]

RUSSELL v. SAUNDERS.

[March 9.

Practice — Cross-examination on affidavit — Rules. 385, 401 and 429.

Motion for injunction. Counsel for defendant objected to plaintiff's affidavit being read as he had served notice asking that plaintiff be produced for cross-examination on his affidavit, but plaintiff had objected to being cross-examined.

Held, that Rules 385 and 429 taken together compel the production for cross-examination of a deponent on his affidavit if required by the opposite party before such affidavit can be used.

Duff, for defendant. *Harold Robertson*, for plaintiff.

Martin J.]

CRUTCHFIELD v. HARBOTTLE.

[March 31.

Mining law—Failure to record transfer of mineral claim—Right of locator subsequent to such transfer—Mineral Act, ss. 9, 49, 50.

In May, 1897, B. located and recorded the May Day claim and six days after location conveyed a half interest to defendant by a bill of sale which was not recorded till April, 1898. B.'s free miner's certificate lapsed in July, 1897, and in October, 1897, the plaintiff, a free miner, relocated the May Day as the Equaliser claim. By section 9 of the Act on the lapse of B.'s certificate his half interest in the May Day became vested in his co-owner, the defendant.

Held, in adverse proceedings, that the defendant's title could not prevail against the plaintiff.

Gallihier and *P. E. Wilson*, for plaintiff. *S. S. Taylor*, Q.C., for defendant.

Book Reviews.

Greenleaf on Evidence.—A treatise on the law of evidence, by SIMON GREENLEAF, LL.D., in three volumes, 16th edition, revised, enlarged and annotated by PROFESSOR WIGMORE and PROFESSOR HARRIMAN; Boston: Little, Brown & Co., 1899.

It is of great interest to the profession even to be told that a new edition of this standard work has been published, but it adds largely to the interest when a writer of such eminence as Professor Wigmore takes charge of the first volume, and Professor Harriman of volumes II. and III. As has been well stated this revision and enlargement has given Greenleaf a new lease of life and renewed his hold upon the profession. Whilst this edition contains the original text, it is claimed that all matters in previous editions which were useless have been eliminated, and new chapters introduced, treating fully on such topics as real evidence, relevancy, circumstantial evidence, exceptions to hearsay rule, and regular entries in the way of business, etc.

The first edition of Mr. Greenleaf's work was published in 1842, the treatises on evidence most in favour at that time being those by Mr. Starkie and Mr. Phillipps, and the thought of the learned writer was rather to prepare a text book for the use of students under his instruction, than to compete with the above works. So admirable was Mr. Greenleaf's first effort that it was taken by Judge Taylor as the model for his work on evidence. How greatly both these standard works have grown in size and value is known to every student of the law ; and what Taylor on Evidence is in England such is Greenleaf on Evidence in the United States. There is of course much in both works not directly appropriate to the use of the Canadian lawyer. But it may be remarked that the circumstances of this Dominion in many respects are very similar to those of the United States, and so there will be found much of value in the work before us which cannot be found elsewhere.

This work is now so modern, so practical and so helpful that it is a necessity to every law library, for therein may be found not only the great fundamental principles of evidence, but their application to every form of action. Volume one being a general treatise can be purchased separately ; volumes two and three, covering the law of evidence as appropriate to various special forms of action and prosecutions for crime, are practically *nisi prius* treatises.

The Law Relating to Electric Lighting and Energy,—Second Edition, by John Shiress Will, Q.C. London: Butterworth & Co. 1900.

This is a collection of the Acts applicable to electric concerns in England, with explanatory notes and references to the comparatively few cases in which this legislation has been discussed. It is doubtless a very useful book to the English practitioner, and to us in this country is interesting as showing the scope of legislation on the subject of electrical energy in England.

There has been a good deal of legislation in this Province lately in reference to electrical light and power, and it will not be out of place to call attention to a section in the English Electric Light Act, of 1888, which makes a very proper provision to prevent the attempted spoliation of capital which unfortunately is rather too pronounced in the large centres of population in these days. By the section referred to it is enacted that any undertaking authorized under the Act to supply electricity may within six months after the expiration of a period of forty-two years be purchased by the municipal authorities upon the terms of paying the then value of the land, machinery and plant at their fair market value, without any addition for goodwill or profits. The Ontario Acts of 1899 and 1900 in reference to these matters is not nearly so conservative and pays much less regard to the interests of capital.

Wit and Humor of Bench and Bar, by MARSHAL BROWN; Chicago: T. H. Flood & Co., 1899.

This contains things new and old. If on opening a page you see something you have seen before turn to the next, for the statement that "there is nothing new under the sun" seems peculiarly applicable to jokes. Some of them are wise, some are otherwise, "not all alike good." However an occasional dip into it is most refreshing. Possibly it might be found useful to keep in an office and hand to a client when depressed and irritated by a lengthy bill of costs.

The Municipal and Assessment Guide, by J. J. Kehoe, Barrister at Law, Sault Ste. Marie. 1900.

This manual will be useful to the general reader as giving a sketch of the law in this Province on the above subjects. It does not, however, give references to the sections of the Act or to decided cases. It is merely intended to give to those who need the information, in every day language, the general and salient features of the law affecting the above subjects.

IN MEMORIAM.

At a meeting of the trustees of the County of York Law Association held on the 27th day of April, 1900, it was resolved "That the Board of Trustees of the County of York Law Association desire to convey to the members of the family of the late Sir John Hawkins Hagarty some expression of their sympathy with them in their recent bereavement. During his long and brilliant professional and judicial career Sir John Hawkins Hagarty inspired in all who enjoyed the privilege of social or business intercourse with him the highest admiration for his stainless life, profound learning and powerful reasoning, while his never failing courtesy and his genial unassuming kindness to everyone entirely disarmed all attack from that spirit of envy which so frequently follows in the footsteps of success such as he achieved. While his judgments will live always in the body of our law as a monument to his own learning and a guide to others, his memory will long be cherished by the members of a profession in which he was such a distinguished ornament, and to none will it be dearer or more revered than to those who, as inexperienced advocates, received at his hands that invariable consideration and encouragement which have so largely contributed to the great respect in which the Court, over which he so long presided, is justly held. It is with unfeigned regard and affection for his memory, and with sincere and respectful sympathy for the members of his family, that this resolution is tendered."

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While it is a matter of regret that a name almost historical as a law publishing house in this Province should have passed off the scene, the profession will doubtless now receive in the publication of the reports the full benefit of the up-to-date energy and careful management of the same firm that publishes this journal. The Law Society has done well in giving to the Canada Law Book Company the printing and publishing of all the Ontario Reports as well as the binding of the Law Reports and books of the Society, which were thrown on the market by the late firm of Rowsell & Hutcheson going out of business. The new firm has also acquired the large stock of back volumes of the Upper Canada and Ontario Reports, some 9000 in all.

Mr. Justice Matthews, in his address at the Romilly Society on the administration of Criminal Law, suggests that on the conclusion of each Assize and Quarter Session a return should be made of the sentences pronounced on prisoners, to endeavour thereby to obtain a greater uniformity in sentences, which, as he says, are glaringly unequal. Whilst we all recognize these inequalities, we doubt whether the suggestion will be found of much value. In this Province Crown Counsel make returns such as above spoken of to the Attorney-General, as well as to one of the offices at Osgoode Hall, and we think it may safely be said that no notice is taken of them, except possibly when an application is made to reduce a sentence in some particular case.

There have been some notable changes in the English judiciary. Lord Morris retires from the position of a Lord of Appeal in Ordinary, closing a judicial career of over thirty years. He was appointed as a Judge in Ireland in 1867 and succeeded the late Lord Fitzgerald in the House of Lords in 1859. Though he may have been surpassed in legal erudition he was remarkable for a sound common sense and knowledge of men and affairs which made him a very useful Judge. Possibly a greater loss to the

Bench is the unexpected resignation of Sir Nathaniel Lindley, of whom it has been said he was the pivot of the Court of Appeal, commanding the full confidence of the public and the profession. He had held judicial office for twenty-five years, and his charm of manner as well as his great ability will long be remembered by those who practised before him. His services, however, will not be entirely lost as he takes his seat in the House of Lords, Lord Morris also being given an hereditary peerage. Sir Nathaniel Lindley is succeeded by Sir Richard Webster, the late Attorney General, who has had one of the most successful careers of the century, the most natural and proper appointment. Sir Robert Finlay, Solicitor General, takes the position thus rendered vacant. He, as his predecessor was, is one of the best lawyers and one of the ablest men that the Bar of England has produced for many years, being, as Lord Beaconsfield said of Lord Cairns, "great in counsel." It thus happens that neither the Attorney General nor the Solicitor General of England are Englishmen, Sir Robert Finlay being a Scotchman born in 1842, and the Right Honorable Edward Carson, the new Solicitor General, being an Irishman born in 1854 and educated at Trinity College, Dublin. He is a man of brilliant talents, as well as having political prominence, and has, at an earlier age than usual, attained the high position which he now occupies.

SUPREME COURT PRACTICE.

Referring to the article by Mr. C. H. Masters, on this subject (ante p. 324), it may be observed that the Ontario Act, 62 Vict., 2nd sess., c. 11, s. 27, seems to settle the question which gave rise to the difference of opinion in the Supreme Court in the case *Farquharson v. Imperial Oil Co.*, now reported in 30 S.C.R. 188, viz., whether there was any intermediate appeal to the Court of Appeal, when the appellant had elected to appeal to a divisional court from the judgment at the trial and his appeal had failed.

The Legislature has now declared that such an appeal has always lain when leave has been given therefor.

Mr. Justice Gwynne's view (concurred in apparently by the full Court), of the Judicature Act, R.S.O. 1897, c. 51, s. 77, as it stood previous to the above amendment, was that no intermediate appeal to the Court of Appeal could, in the case put, be brought even

by leave, but he held, the Chief Justice concurring with him, Taschereau and Sedgwick, JJ, contra, that leave to appeal to the Supreme Court *per saltum* might nevertheless be given.

Inasmuch, however, as an intermediate appeal may now, on condition of leave being granted, be maintained, there seems no longer any room to deny the power of the Supreme Court under s. 26 (3) of the Supreme Court Act to grant leave to appeal *per saltum* to the unsuccessful appellant in the Divisional Court.

The amendment referred to was in force when the appeal to the full court from Mr. Justice Gwynne's decision in Chambers was argued, and as it is expressly required to be construed retrospectively to the 7th April, 1896, when the Judicature Act was passed, it might be thought that the ground for the difference of opinion referred to had already been removed. Probably the amendment was not brought to the attention of the Court, as it is not referred to in the report of the case.

THE JUDICIAL COMMISSION.

The appointment of a commission of Judges to enquire into the acts of fraudulent dealing with ballots, and other misdoings, which are alleged to have taken place in connection with certain elections in the Province of Ontario, opens a wide field for discussions, and suggests several questions of much importance. It may be stated as a general proposition, from which none will dissent, that it is not desirable that Judges should be called upon to act in any matter of a quasi political character, or in which the interests of political parties are in any way concerned. Nor is it desirable that, for any purpose, political or otherwise, the Judges should have their regular work, which is quite sufficient to occupy all their time and attention, interfered with by the imposition of other duties, no matter how important. It is indeed a striking proof of the extent to which the virus of party has eaten into the very vitals of our system of government, that, in so many matters directly affecting the management of our public affairs, we apparently dare not intrust ourselves with their control, and, instead of reforming our own pernicious ways and striking at the root of the evil, we throw the disagreeable duty upon some other body which we can trust to perform it with efficiency and integrity. Under such circumstances it is indeed fortunate for us that, in our judiciary, we have a body

in whose freedom from the corrupting influences which affect ourselves we can absolutely rely.

Certainly if anything could justify the present appointment of a judicial commission the state of things existing, as shown by recent disclosures, would do so, but if the disease is to be cured some more potent remedy than the appointment of a commission must be found. The commissioners may fix the guilt upon the proper shoulders, and show how far the responsibility for it extends, but unless the public at large, irrespective of party, exert their proper influence, resolved that in future party interests shall not be an excuse for wrong-doing, the judges may just as well be allowed to confine themselves to their proper duties, and avoid the risk of being mixed up in party conflicts. The people have the remedy in their own hands and should use it, and not fall into the easy habit of calling upon judges, or any other functionaries, to get them out of the troubles which are entirely due to their own indifference, and, too often, to their connivance.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act.)

**PRACTICE — PARTICULARS — DISCOVERY — INSPECTION — PRIVILEGE — RULE 203
(ONT. RULE 299)—RULE 358 (ONT. RULE 469).**

Milbank v. Milbank (1900) 1 Ch. 376, is a case which exemplifies the fact that documents which may be privileged from production for the purpose of discovery may, nevertheless, be subject to the provisions of Rule 203 (Ont. Rule 299), so that the party in whose possession they are may be bound to give particulars thereof to the opposite party. The plaintiff claimed a declaration that she was entitled (subject to incumbrances) to an estate in fee simple in the lands in question in the action of which the defendant was in possession, and claimed by his defence to be in as owner under a sale made by mortgagees under a power of sale in their mortgage, and that he had purchased in good faith without notice of the plaintiff's title, and he relied on his title as such bona fide

purchaser, and alleged that he had re-mortgaged the land to his vendors, and that the action could not be maintained in their absence. The defendant made an affidavit of documents in which he sufficiently claimed protection for a bundle of documents, which included the deeds by which the transactions referred to in his defence were carried out. The plaintiff, however, applied for the delivery of particulars of those transactions, namely, the date of the sale and conveyance to him by the mortgagees, and what was the valuable consideration for the same; the date of the re-mortgage by him, and for how much it was given. Kekewich, J., was of opinion that, because the documents were privileged from production by way of discovery, the defendant could not be required to give particulars nor permit inspection of them, as asked; but the Court of Appeal (Lindley, M.R., and Rigby and Williams, L.JJ.) came to the conclusion that the right to discovery, and the right to particulars of documents referred to in a pleading, are distinct and independent rights, and the mere fact that the documents are privileged from production for discovery does not render them also exempt from the operation of the Rules relating to particulars, but the appeal from Kekewich, J., so far as he refused inspection of the documents, was dismissed.

PRACTICE — DECEASED JUDGMENT DEBTOR — ORDER TO ISSUE EXECUTION AGAINST EXECUTOR — CHARGING ORDER — CLERICAL ERROR.

In *Stewart v. Rhodes* (1900) 1 Ch. 386, the original defendant having died after judgment, an order was made for leave to issue execution against his executor, and also charging the defendant's interest in certain stock unless sufficient cause should be shown to the contrary on a day named. Before the order was made absolute, an order for the administration for the estate of the deceased judgment debtor was granted; and on the motion to make the order absolute, it was objected that the order was wrong, because it purported to charge the debtor's interest in the stock, and not that of his executor, and that, after an administration order had been made, it would not be proper to amend the order nisi. The Court of Appeal (Lindley, M.R., and Rigby and Williams, L.JJ.) held the order nisi to be erroneous, and proceeded on the ground that it could not be properly made in any case as against an executor until a judgment had been obtained against him, and they seem to suggest that an order for leave to issue

execution against an executor of a deceased judgment debtor is not equivalent to recovering a judgment against the executor, but simply dispenses with the necessity of a judgment against him for the purpose of issuing execution; but unless there is a judgment recovered against the executor, the Court considers there is no jurisdiction to make a charging order against him under 1 & 2 Vict., c. 110; and the judgment creditor's remedy, unless he does obtain a judgment, is to bring an administration action. The effect of an order to continue proceedings and for leave to issue execution against the personal representation of a deceased judgment debtor was recently under consideration in a Divisional Court of this Province in the case of *Allison v. Breen*, where we think the court came to the conclusion that the order was equivalent to a revivor of the judgment as against the executor, who thereby became bound as a party to the action; and we should think the practice defective, if it should be held that an action in the nature of a sci. fa. is still necessary in order to make a judgment, under such circumstances, a judgment against the personal representatives of a deceased debtor.

PRACTICE—SECURITY OF COSTS—FOREIGNER RESIDENT ABROAD CLAIMING FUND IN COURT—GENERAL INQUIRY—CLAIMANT OF FUND IN COURT—INTERPLEADER.

In re Milward & Co. (1900) 1 Ch. 405, a solicitor was ordered to pay into court a fund in his hands belonging to a client, subject to the claims of certain alleged incumbrances thereon, and, an inquiry, was directed who was entitled thereto. A foreigner resident abroad claimed to be entitled to a charge on the fund. The client applied to Kekewich, J., for an order requiring this claimant to give security for costs, but that learned judge considered that it was the case of a direction for a general inquiry, in which it was not the course of the court to require claimants seeking to prove claims, even though resident abroad, to give security for costs. The Court of Appeal, however, considered that as the fund clearly belonged, prima facie, to the client, the proceeding was really in the nature of an interpleader, in which the foreign claimant was in the position of a plaintiff, and that, therefore, he should be ordered to give security.

COMPANY—VOLUNTARY WINDING-UP—LIQUIDATOR—APPOINTMENT.

In re Trench Tubeless Tyre Co. (1900) 1 Ch. 408, discusses the validity of the appointment of a liquidator for the purpose of a

voluntary winding-up. It appeared that at a meeting of the company held on the 1st November, 1899, a resolution was passed for the voluntary winding-up of the company and the appointment of a Mr. Walker as liquidator. Notice was then given to the shareholders that a meeting would be held on 16th November when the subjoined resolutions, duly passed at the previous meeting, would be submitted for confirmation, viz., that the company be wound up and that Mr. Walker be liquidator. At the meeting on the 16th November, however, the resolution proposing Mr. Walker as liquidator failed for want of a seconder, and a resolution was then proposed and carried appointing Mr. Marreco the liquidator. Kekewich, J., considered that it was not competent for the meeting to change the liquidator, and that Marreco's appointment was therefore invalid; but the Court of Appeal (Lindley, M.R., and Rigby and Williams, L.JJ.) held that it was perfectly competent for the meeting to elect some other liquidator than the one named in the notice calling the meeting, without adjourning the meeting or giving any further notice.

RESTRICTIVE COVENANT—BUILDING ESTATE—RESTRICTION AS TO NUMBER OF HOUSES—FLATS.

In *Kimber v. Admans* (1900) 1 Ch. 412, Cozens Hardy, J., has determined that a house built for the purpose of being rented in flats is only one "house," and not a violation of a restrictive covenant against erecting more than one "house," unless there is something in the context which cuts down or alters the ordinary meaning of the word. The plaintiff's contention that each flat was a house was rejected.

WILL—CONSTRUCTION—"ISSUE"—"CHILDREN."

In *re Birks, Kenyon v. Birks* (1900) 1 Ch. 417. In this case the Court of Appeal (Lindley, M.R., Jeune, P.P.D., and Romer, L.J.) have been unable to agree with Kekewich, J., on the construction of the will, (1899) 1 Ch. 703, (noted ante, vol. 35, p. 484.) It may be remembered that in this case the testator had given twelve distinct legacies, with gifts, over to the issue of the legatees dying in the testator's lifetime, and in all except the eleventh legacy the gifts over were qualified by words restricting the word "issue" to children. In the eleventh legacy there were no such restrictive words, and the question was whether there was any canon of

construction requiring the word "issue" in the gift over of the eleventh legacy also to mean "children." Kekewich, J, held that its meaning was not to be so restricted; but the Court of Appeal were unanimous that, as the testator had already indicated the sense in which he used the word "issue" as regards the other legacies, it was reasonable and proper to assume that he intended it to have the same meaning when used in reference to the eleventh legacy, consequently the gift over of that legacy was also confined to children of the legatee, and did not extend to his descendants generally.

COMPANY—PROSPECTUS, UNTRUE STATEMENT IN—MISLEADING STATEMENT IN PROSPECTUS—DIRECTOR, LIABILITY OF, FOR FALSE PROSPECTUS—DIRECTORS' LIABILITY ACT, 1890 (53 & 54 VICT., C. 64), s. 3, SUB-S. 1; (R.S.O. C. 216, S. 4)—WAIVER CLAUSE IN PROSPECTUS.

Greenwood v. Leather Shod Wheel Co. (1900) 1 Ch. 421, was an action by a shareholder against a joint stock company and its directors to rescind a contract to take shares in the company and for rectification of the company's register by removing the plaintiff's name from the list of shareholders, and to recover the amount paid by plaintiff, and for damages against the directors for the loss sustained by the plaintiff by reason of his having subscribed for the shares in question, relying on the statements contained in the prospectus, which were alleged to be untrue and misleading. The prospectus also contained a clause whereby subscribers for stock were to be deemed to have notice of all agreements which might fall under s. 38 of The Companies Act, 1867, which requires agreements between the company and promoters to be specified in the prospectus, even though such agreements were not actually so specified. The principal objection to the prospectus was that it alleged that orders had been received for wheels which the company was formed for the purpose of manufacturing, whereas the orders referred to were merely orders for trial or sample wheels; also, that there were agreements between the company and the promoter, which were not specified on the prospectus, as required by The Companies Act, s. 38. As to the latter, the defendants contended that the plaintiff had contracted himself out of the right to complain of the omission. The defendants also contended that the statements in the prospectus were true in the sense in which they were used by the directors, and they could not

be held to be untrue, because the plaintiff had otherwise understood them. These arguments failed; and Kekewich, J., gave the plaintiff the relief claimed, and his decision was affirmed by the Court of Appeal (Lindley, M.R., Jeune, P.P.D., and Romer, L.J.). The waiver clause in the prospectus was held to be 'tricky' and 'fraudulent,' and inoperative as against the plaintiff; and the statements that 'orders' had been received were held to be 'a misleading and untrue statement' within the meaning of the Directors' Liability Act, 1890, and it was held to be no answer to say that in a certain sense they were true, and that the directors could only relieve themselves from liability by establishing that they had reasonable ground for believing, and did believe, the statements were true in the sense which they would be likely to be understood by the public.

**WILL—FOREIGNER—POWER OF APPOINTMENT—EXECUTION OF POWER BY WILL
VALID ACCORDING TO LAW OF TESTATOR'S DOMICIL.**

In re Price, Tomlin v. Latter (1900) 1 Ch. 442, discusses whether a will of a domiciled foreigner, validly executed according to the testatrix's place of domicile, but not executed in accordance with the English Wills Act, was a valid execution by the testatrix of an English power of appointment over personal estate, which she was empowered to exercise by will. In other words, must the will in exercise of the power be a will executed in accordance with the Wills Act, or was it sufficient, if validly executed according to the law of the testatrix's domicile? This question Stirling, J., decided in accordance with *D'Huart v. Harkness* (1865), 34 Beav. 324, and the will having been recognized as a valid will in England by the Probate Division, which had granted letters of administration with the will annexed, he held it to be a valid execution of the power.

**COMPANY—WINDING-UP—RECEIVER APPOINTED BY DEBENTURE HOLDERS—
SURPLUS IN HANDS OF RECEIVER—SUMMARY APPLICATION BY LIQUIDATOR
TO RECOVER SURPLUS IN HANDS OF RECEIVER—JURISDICTION.**

In re Vimbos, Ltd. (1900) 1 Ch. 470, was a summary application by a liquidator in a winding-up proceeding to recover from a receiver who had been appointed by certain debenture holders of the company in liquidation to recover a surplus alleged to be in his hands, after satisfying the claims of the debenture holders. The

power to appoint the receiver did not contain any direction as to what the receiver was to do with the surplus, and he claimed to retain it for his remuneration. The liquidator asked that his remuneration might be fixed by the Court, and that he should be ordered to pay over the balance. Cozens-Hardy, J., was of opinion that the receiver was the agent of the mortgagees, and not of the company, and as such was not amenable to the summary jurisdiction, and that, even if he were to be regarded as the agent of the company, he would not be subject to the summary jurisdiction of the court, but an action must in either case be brought.

SOLICITOR—UNDERTAKING—ENFORCING SOLICITORS' UNDERTAKING.

In re Coolgardie Goldfields (1900) 1 Ch. 475, may be referred to as illustrating the summary way in which the court is accustomed to enforce the undertakings of solicitors. During the hearing of an application to the Court by two shareholders to strike out their names from the register of a limited company some documents were tendered in evidence by the company which ought to have been, but were not, stamped. Counsel for the company gave the undertaking of a member of the firm of the company's solicitors to pay the duties. The order was made striking out the applicants' names. The duties not having been paid, the shareholders were unable to get the order issued, and they applied to commit the solicitor for breach of his undertaking, and for leave to issue the order, notwithstanding the documents were not stamped. Cozens-Hardy, J., directed the order to be drawn up without entering the unstamped documents, the company undertaking not to appeal from the order. He also ordered the solicitor to cause the documents to be stamped within four days after service of the order, and reserved liberty to the Inland Revenue Commissioners to apply in case the solicitor made default, and the solicitor was ordered to pay the costs.

PRACTICE — SOLICITORS' UNDERTAKING — ENFORCEMENT OF UNDERTAKING — SERVICE OF ORDER CONTAINING UNDERTAKING.

D. v. A. & Co. (1900) 1 Ch. 484, is a case similar to the last. In this case, the undertaking of the solicitors was embodied in an order. On a motion for liberty to issue an attachment against the solicitors for breach of the undertaking, it was objected that the order containing the undertaking had not been served, and,

secondly, that the remedy was by committal and not by attachment, and that in that case personal service of the notice of motion was necessary. As to the first point, Cozens-Hardy, J., held that service of the order was unnecessary; but on the second point he was of opinion that the proper remedy for breach of an undertaking, whether positive or negative, is committal, and that personal service of the notice of motion was necessary, and he refused the motion, with costs.

POWER OF APPOINTMENT—EXERCISE OF POWER BY WILL—FOREIGNER.

Pouey v. Hordern (1900) 1 Ch. 492, presents some features of similarity to *Re Price*, noted ante, p. 369. In this case, also, a domiciled Frenchwoman had a power of appointment by will over a fund under an English settlement. She made a will in France reciting the power and purporting to execute it in favour of her daughter, the plaintiff. It was contended that, inasmuch as the testatrix had married a domiciled Frenchman without a settlement, any property she was entitled to was subject to the French law as to comity of goods, and therefore that she could not dispose of or appoint the fund in question in favour of her daughter. Farwell, J., however, was of opinion that the distinction between power and property is well settled, and that the exercise of a power is not a disposition of property, and that the exercise of the power was in no way affected by any disability which the testatrix may have been under as to the disposition of her own property.

LANDLORD AND TENANT—FORFEITURE OF LEASE—BREACH OF COVENANT—NOTICE OF BREACH, BAD IN PART—CONVEYANCING AND LAW OF PROPERTY ACT, 1881 (44 & 45 VICT., c. 41), s. 14—(R.S.O. c. 170, s. 13(1)).

In *Pannell v. City of London Brewery* (1900) 1 Ch. 496, the point discussed by Buckley, J., was whether a notice of breaches of covenant in a lease given under the Conveyancing & Law of Property Act, 1881, s. 14, (R.S.O. c. 170, s. 13(1)), is bad in toto if it turns out that, although some of the alleged breaches have occurred, others alleged, have not taken place, or that the lessor is not entitled to rely on them. This point he determined in the negative, and in doing so distinguishes *Horsey v. Steiger* (1899) 2 Q.B. 79 (noted ante, vol. 35, p. 672), where the notice he considers was held bad, not because it included an alleged breach, which

had not in fact taken place, but because the time allowed for remedying the breach properly alleged was too short, a distinction which is not very apparent on the face of the report, and which seems to have escaped the notice of the writer of our note of the case.

WILL—CONSTRUCTION—ESTATE, DEVISED—ESTATE TAIL—INTENTION—WILLS ACT (1 VICT., c. 26), s. 28—(R.S.O. c. 128, s. 30).

Crumpe v. Crumpe (1900) A.C. 127, was an appeal from the Irish Court of Appeal, upon the construction of a will, whereby the testator devised his fee simple estates to trustees to give the rents to his nephew, Silverius Moriarty; but in case Silverius encumbered the lands or rents at any time, the testator revoked the gift of the rents "from Silverius Moriarty and from his heirs male," or should Silverius not forfeit the same, and should "die without male issue him surviving," he bequeathed the rents and estates to William Moriarty and his issue in tail male. Silverius executed a disintailing deed and died, without heirs male of his body, having devised the land to the respondent. The appellant claimed to be entitled as the heir male of William Moriarty, and the question presented for decision was whether Silverius took an estate in fee simple under the Wills Act, s. 28 (see R.S.O. c. 128, s. 30), subject to an executory devise over, as the appellant contended; or whether he took an estate in fee tail, as the respondents claimed and as the Irish Courts had held. The House of Lords (Lord Halsbury, L.C., and Lords Ashbourne, Macnaghten, Morris, Shand, James and Brampton) unanimously agreed with the Irish Courts that, according to the true intention of the testator, an estate in fee tail male was devised to Silverius, and that, consequently, a "contrary intention" sufficiently appeared by the will so as to prevent the estate devised being a fee simple as provided by s. 28.

INSURANCE—GUARANTEE OF SOLVENCY OF SURETY—CONCEALMENT OF MATERIAL FACTS—UBERRIMA FIDES.

Seaton v. Burnand (1900) A.C. 135, is the case known as *Seaton v. Heath* in the courts below. The action, it may be remembered, was brought on a policy guaranteeing the solvency of a surety for the payment of a loan made by the plaintiff to a third party at a high rate of interest, about 40 per cent. The Court of Appeal

(1899) 1 Q.B. 782 (noted ante, vol. 35, p. 409), set aside the judgment in favour of the plaintiff and directed a new trial, because they thought that whether the non-disclosure of the circumstances of the transaction to the defendants (more particularly the high rate of interest to be paid by the borrower) was material to the risk, was a question for the jury; and Romer, L.J., expressed the opinion that such a contract was like a contract of insurance, in which the party who induces the contract is bound to exercise *uberrima fides*. The House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, Morris, Davey, Brampton and Robertson) took a very different view of the matter, and considered that there was no concealment of any material facts, inasmuch as the guarantors made no inquiry as to the circumstances under which the loan was made, and evidently did not regard it as material to the risk they were asked to undertake, which was to guarantee the solvency of a man who was at the time of unimpeached credit. The Lord Chancellor humbly remarks in regard to the verdict found in favour of the plaintiff: "I think Mr. Lawson Walton went so far as to say that no reasonable jury could have found the verdict they did. I was sorry to hear him say so, because I should certainly have found the same verdict, and I am afraid the inference is unfavourable to me when I say that."

WILL — CONSTRUCTION — DIRECTION TO ACCUMULATE — TENANT FOR LIFE — REMAINDERMAN — CONVERSION.

Wentworth v. Wentworth (1900) A.C. 163, is a decision of the Judicial Committee of the Privy Council on appeal from the Supreme Court of New South Wales upon the construction of a will. The points at issue turned upon a clause in the will, whereby the testator devised his residue upon trust to convert, with power to postpone conversion for twenty-one years, and with a direction that the surplus income of the unconverted estate during the twenty-one years, and all accumulations thereof should go in augmentation of the capital. The residue was settled upon trusts for tenants-for-life and remaindermen. The trustees under power in the will granted a mining lease, and retained the leased property unconverted for more than twenty-one years. Two questions were determined in the court below—(1) that the rents and royalties received between the testator's death on March 20, 1872, and March 20, 1893, under the mining lease, were subject to a trust

for accumulation, and that the income, therefore, was also to be accumulated ; and (2) that the rents and royalties received under such lease after March 20, 1893, were to be treated as capital. On the appeal to the Privy Council, it was contended on behalf of the tenants-for-life that the income derived from the rents and royalties received during the twenty-one years were not subject to the trust for accumulation, which it was claimed only applied to the income of his unconverted real and personal estate, and that as between the tenants-for-life and remaindermen the former were entitled to the income derived from the investment of the rents and royalties received during the first twenty-one years ; that, after the lapse of the twenty-one years, there was no power in the trustees to postpone conversion, and that the estate must be treated as then converted, and that a sum equal to the income which would have been devised had the estate been converted was payable to the tenants-for-life. The Judicial Committee (Lords Hobhouse, Macnaghten, Morris, Davey and Robertson) agreed with the court below as to the first point, and held the income of the rents during the twenty-one years to have been properly accumulated by the trustees. On the second point, however, they decided in favour of the appellants and varied the judgment appealed from by declaring that the appellants were entitled to receive out of the rents and royalties accrued and accruing after March 20, 1893, such an annual sum as in the opinion of the court would, under all the circumstances of the case, be a fair equivalent for the annual income that would have been received by them if the residuary estate had been sold on March 20, 1893, and the proceeds invested in accordance with the will.

ACCOUNT—SCOPE OF REFERENCE, EXCEEDING.

Bennicourt v. Le Gendre (1900) A.C. 173, is a decision of the Judicial Committee (Lords Hobhouse, Davey and Robertson, and Sir R. Couch) on a comparatively simple point. The appellant's claim by his writ of summons was "to have an account taken of what is due to the plaintiff, under a certain agreement dated in January, 1892, for pitch dug and won from the plaintiff's land and land of one Eugenia Bennicourt (since deceased) at Le Brea." An order was subsequently made that the "accounts in this matter" be taken. The judge to whom the reference was directed took the account not only of the pitch dug from the lands of the

plaintiff and Eugenia Bennicourt, but also from the lands of one Joasse, and there was no evidence of any relation between those transactions and the Bennicourts, which made them relevant to the account ordered. At the close of the evidence this fact was pointed out by the appellant's counsel, but disregarded by the judge. The judgment pronounced on the erroneous certificate was therefore set aside, and the cause remitted with a direction to vary the certificate by disallowing all entries in the account relating to the pitch dug on the lands of Joasse, or otherwise than from the lands of the Bennicourts.

CABLEGRAMS—CONTRACT IN CYPHER—CONTRACT, MEANING OF—ONUS PROBANDI—MISTAKE.

Falck v. Williams (1900) A.C. 176, was an appeal from the Supreme Court of New South Wales. The action was brought on a contract concluded by telegram in cypher, which, according to the plaintiff's understanding of it, meant one thing, and according to the defendant's something else. The plaintiff contended that the telegram was so plain as to admit of no other interpretation than that which he put upon it; but the Judicial Committee of the Privy Council (Lords Hobhouse, Davey and Robertson, and Sir R. Couch) were of the opinion that the telegram was ambiguous, and that the onus was on the plaintiff to make out that the construction he had placed upon it was the true one, and in that he had failed, and the action was held to be rightly dismissed.

CONTRACT—CONSTRUCTION—EXTRINSIC EVIDENCE, ADMISSIBILITY OF.

Bank of New Zealand v. Simpson (1900) A.C. 182, was an action brought by Simpson against the bank on a contract relating to a railway of which Simpson was engineer, and which provided inter alia that he should be allowed a certain additional percentage "on the estimate of £35,000, in the event of [his] being able to reduce the total cost of the works below £30,000." It was for this additional percentage the action was brought, and at the trial the defendants adduced evidence extrinsic to the written contract, to show that in arriving at "the total cost of the works" the cost of lands bought for the railway, and the plaintiff's fees under the contract, were to be included in the calculation, and being so included, the total cost had not been reduced below £30,000. On this evidence a verdict was given for the defendants.

The court below, however, granted a new trial on the ground that the case must be decided on the written contract alone, and that the expression "the total cost of the works" was so clear and unambiguous that no extrinsic evidence was admissible to construe it, or explain the meaning given it by the parties, and that 'works' meant and must be confined to "construction works." From this decision the Judicial Committee of the Privy Council (Lords Davey and Robertson and Sir R. Couch) dissented, and held that the evidence objected to was admissible, and that the verdict of the jury ought not to have been disturbed, and the appeal was consequently allowed.

**CONTRACT—LUMP SUM—NON-PERFORMANCE OF CONTRACT—PART PERFORMANCE
—VARIATION OF CONTRACT—AGENT, AUTHORITY OF—RATIFICATION—NOTICE
OF APPEAL.**

Forman & Co. v. The Liddesdale (1900) A.C. 190, was an action commenced in the Admiralty Court of Victoria to recover for repairs effected by the plaintiffs upon a steamer. The steamer in question was stranded, but subsequently got off; but having been condemned by the Marine Board of Victoria, her owners, who resided in England, authorized the master of the vessel to enter into a contract with the plaintiffs to repair the damage occasioned by the stranding for a lump sum, which he did. The plaintiffs proceeded in part performance of the contract to do a large amount of repairs, but they never completely performed the contract, but they did work which they claimed was equivalent to that called for in the contract, or better. They sued for the contract price, and also for a large amount for extras and other repairs not included in the contract. It appeared that the master's authority was expressly limited to making a contract for repairs of the damage occasioned by the stranding, and that some of the extras and other repairs were done with the knowledge of the master, and were authorized by him, though not in writing, as required by the contract. It appeared that as to part of the claim, which had been disallowed by the court below, the plaintiff's notice of appeal did not extend, and the Judicial Committee held that the appellants were in consequence debarred from raising any question as to that on the appeal. As regards the main ground, the committee (Lords Hobhouse, Davey and Robertson and Sir R. Couch) agreed with the court below that where a contract is

for a lump sum, and has not been performed, no part of the contract price is recoverable. The law as laid down by Lord Blackburn in *Appleby v. Myers* L.R. 2 C P. 651 on this point is approved, viz., that a contractor for a lump sum who has not performed the stipulated work can only recover something under his contract where he has been prevented by the defendant from performing his work, or where he has made a new contract that he shall be paid for the work he has actually done, neither of which conditions were found to exist in the present case. The fact that the defendant had accepted the ship and sold it was held to be no ratification on their part of any contract for repairs made by their agent without their authority.

CANADA TEMPERANCE ACT, 1864, s. 17—CONSTRUCTION.

In *Wentworth v. Mathieu* (1900) A.C. 212, the Judicial Committee of the Privy Council (Lords Hobhouse, Davey, Robertson, and Sir R. Couch) have reversed a decision of the Superior Court of Quebec upon the construction to be placed on the Canada Temperance Act, 1864, ss. 15 and 17. The defendant had between June 9 and July 20, 1898, been convicted twenty-nine times for breaches of the Act, and penalties had been imposed on him, amounting in the aggregate to \$1,400. Having paid the fine in respect of the first conviction, he obtained a certiorari as to the second, and it was quashed on the ground that by s. 17 it was permitted to include any number of offences in one complaint, and that the maximum penalty for all offences committed within three months prior to prosecution was not to exceed \$100. The Judicial Committee was unable to agree with this construction of the Act, and held that the provision in s. 17 enabling several offences to be included in one complaint is permissive and not compulsory, and that s. 15 did not, as the court below assumed, fix \$100 as the maximum amount of penalties that could be imposed for all breaches of the Act for a period of three months preceding the prosecution. The order quashing the second conviction was therefore reversed.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Que.] GRIFFITH v. HARWOOD. [May 8.]

Appeal—Jurisdiction—Final judgment—Plea of prescription—Judgment dismissing plea—Costs—R.S.C. c. 135, s. 24, art. 2267 C.C.

A judgment affirming dismissal of a plea of prescription when other pleas remain on the record is not a final judgment from which an appeal lies in the Supreme Court of Canada. *Hamel v. Hamel*, 26 Can. S.C.R. 17, approved and followed.

An objection to the jurisdiction of the Court should be taken at the earliest moment. If left until the case comes on for hearing and the appeal is quashed, the respondent may be allowed costs of a motion only.

Appeal quashed with costs.

Atwater, Q.C., and *Duclos*, for appellant. *Ryan*, for respondent.

Que.] BANQUE JACQUES-CARTIER v. GRATTON. [May 8.]

Will—Powers of executors—Promissory note—Advancing legatee's share.

M., who was a merchant, by his will gave a special direction for the winding up of his business and the division of his estate among a number of his children as legatees and gave to his executors, among other powers, the power "to make, sign, and endorse all notes that might be required to settle and liquidate the affairs of his succession." By a subsequent clause in his will he gave his executors "all necessary rights and powers at any time to pay to any of his said children over the age of thirty years, the whole or any part of their share in his said estate for their assistance either in establishment or in case of need, the whole according to the discretion, prudence and wisdom of said executors," etc. In an action against the executors to recover the amount of promissory notes given by the executors, and discounted by them as such in order to secure a loan of money for the purpose of advancing the amount of his legacy to one of the children who was in need of funds to pay personal debts,

Held, affirming the judgment appealed from, that the two clauses of the will referred to were separate and distinct provisions which could not be construed together as giving power to the executors to raise the loan upon promissory notes for the purpose of advancing the share of one of the beneficiaries under the will. Appeal dismissed with costs.

Brousseau, for appellant. *Aime Geoffrion*, for respondent.

Que]. CULLY v. FERDAIS. [May 17.
Appeal—Jurisdiction—Servitude—Action confessoire—Execution of judgment therein—Localization of right of way—Opposition to writ of possession—Matter in controversy—Title to land—Future rights.

An opposition to a writ of possession issued in execution of a judgment allowing a right of way over the opposant's land does not raise a question of title to land nor bind future rights, and in such a case the Supreme Court of Canada has no jurisdiction to entertain an appeal.

Langevin v. Les Commissaires d'Ecole de St. Marc, 18 Can. S.C.R. 599; *O'Dell v. Gregory*, 24 Can. S.C.R. 661; *Riou v. Riou*, 28 Can. S.C.R. 53; *Chamberland v. Fortier*, 23 Can. S.C.R. 371; *La Commune de Berthier v. Denis*, 27 Can. S.C.R. 147; and *McGoey v. Leamy*, 27 Can. S.C.R. 193, 545 discussed. Appeal quashed with costs.

Lajoie, for motion. *Lafleur*, Q.C., contra.

Que.] NOEL v. CHEVREFILS. [May 17.
Appeal—Jurisdiction—Matter in controversy—R.S.C. c. 135, s. 29(b)—Tutorship.

The Supreme Court of Canada has no jurisdiction to entertain an appeal from a judgment pronounced in a controversy in respect to the cancellation of the appointment of a tutrix to minor children. Appeal quashed with costs.

Bisaillon, Q.C., for motion. *Fitzpatrick*, Q.C., contra.

B.C.] DUNSMUIR v. LOWENBERG. [May 18.
Contract—Parol agreement—Evidence—Withdrawal of questions from jury—New Trial.

D. gave instructions in writing to H. respecting the sale of a coal mine on terms mentioned and agreeing to pay a commission of 5 per cent. on the selling price, such commission to include all expenses. H. failed to effect a sale.

Held, affirming the judgment appealed from, that in an action by H. to recover expenses incurred in an endeavor to make a sale and reasonable remuneration, parol evidence was admissible to show that the written instructions did not constitute the whole of the terms of the contract, but there had been a collateral oral agreement in respect to the expenses, and that the question as to whether or not there was an oral contract in addition to what appeared in the written instructions was a question that ought properly to have been submitted to the jury. Appeal dismissed with costs.

Aylesworth, Q.C., for appellant. *S. H. Blake*, Q.C., for respondents.

Ont.] CANADIAN PACIFIC R.W. CO. v. CITY OF TORONTO. [May 30.

Appeal—Vendor and Purchaser Act—Reference to Master—Admission of evidence—Appeal from certificate—Final judgment—R.S.C. c. 135, s. 24 (e).

Where a Master, on a reference under the Vendor and Purchaser Act to settle the title under a written agreement for a lease, ruled that evidence might be given to show what covenants the lease should contain, an appeal does not lie to the Supreme Court from the judgment affirming such ruling, it not being a final judgment and the case not coming within the provisions of s. 24 (e) of the Supreme and Exchequer Courts Act relating to proceedings in equity. GWYNNE, J., dissenting. Appeal quashed with costs.

Robinson, Q.C., and Fullerton, Q.C. for motion. Aylesworth, Q.C., and MacMurchy, contra.

Ont.] CANADIAN PACIFIC R.W. CO. v. CITY OF TORONTO. [May 30.

Appeal—Vendor and Purchaser Act—Reference to Master—Admission of evidence—Appeal from certificate—R.S.C. c. 135, s. 24 (e).

By agreement in writing the City of Toronto undertook to acquire certain land and lease it to the railway company for 50 years renewable in perpetuity. An abstract of title having been refused, the company obtained an order of the Court under the Vendor and Purchaser Act, for its delivery, and a reference of all matters respecting the title to a Master. The title was made out and a draft lease presented to the Master containing a covenant by the company to pay taxes to which exceptions were filed. The city then proposed to give evidence of negotiations prior to the written agreement, showing that the covenant should be inserted, which the Master allowed, and granted a certificate therefor, from which the company appealed. The certificate having been sustained by the Divisional Court and Court of Appeal, the company appealed to the Supreme Court;

Held, GWYNNE, J., dissenting, that the judgment appealed from was not a final judgment within the meaning of the Supreme and Exchequer Courts Act, nor was it a decree or decretal order in a judicial proceeding in the nature of a suit or proceeding in equity under sec. 24 (e) of that Act; the Court had, therefore, no jurisdiction to hear the appeal. Appeal quashed, with costs.

Armour, Q.C., and MacMurchy, for appellant. Robinson, Q.C., and Fullerton, Q.C., for respondent.

EXCHEQUER COURT.

Burbidge, J.]

[April 17.

IN RE METROPOLITAN RAILWAY COMPANY.

Railways—Making order of Railway Committee of Privy Council a rule of Exchequer Court—Condition—Ex parte order.

This was an application of the above railway to connect its tracks with the tracks of the Canadian Pacific Railway Company by means of a switch in the City of Toronto.

By s. 29 of the Railway Act, 51 Vict., c. 17, the Exchequer Court is empowered to make an order of the Railway Committee of the Privy Council a rule of Court; but where there are proceedings depending in another Court in which the rights of the parties under the order of the Railway Committee may come in question, the Exchequer Court, in granting the rule may suspend its execution until further directions.

2. The Court refused to make the order of the Railway Committee in this case a rule of Court upon a mere ex parte application, and required that all parties interested in the matter should have notice of the same.

Barwick, Q.C., and Glynn Osler, for motion. H. L. Drayton, contra.

Burbidge, J.]

[May 7.

GENERAL ENGINEERING COMPANY v. DOMINION COTTON MILLS COMPANY.

Patent—Expiry of Foreign Patent—R.S.C., c. 61, s. 8—55-56 Vict., c. 24, s. 1—Construction—"Foreign Patent"—"Exist."

By the Patent Act, R.S.O., c. 61, s. 8 (as amended by 55-56 Vict., c. 24, s. 1) it is enacted that "under any circumstances, if a foreign patent exists, the Canadian patent shall expire at the earliest date on which any foreign patent for the same invention expires." J. filed an application for a Canadian patent for new and useful improvements in boiler and other furnaces on the 1st of March, 1892. On the same day he applied for a British patent and also for an Italian patent in respect of the same invention. The British application was accepted on the 30th April, 1892, and the patent issued on the 12th July, but was dated, as is the practice in England, as of the date of the application, viz., 1st March, 1892. The Italian patent was issued on the 19th of March, 1892, and was granted for a term of six years from that date. The Canadian patent was granted on the 15th October, 1892. The British patent became forfeited for non-payment of certain fees and annuities due thereon on the 1st March, 1897. The inventor was in default in respect of payment of fees on the Italian patent in 1895, and while there was some doubt whether such default operated a forfeiture ipso facto under the Italian law, there was no doubt that it

expired at the expiry of the six years when no steps were taken by the inventor for its renewal.

Held,—1. The Canadian patent was void.

2. The words "Foreign patent," as used in the above enactment include all patents that are not Canadian.

3. The word "exists" has reference to the date or time when the Canadian patent is granted, not when it is applied for.

4. The words "shall expire at the earliest date on which any foreign patent for the same invention expires" are not to be limited to the expiration by lapse of time of the potential term of the foreign patent, but include any ending at a time earlier than the end of the term for which the patent is granted.

Rowan and Ross, for plaintiffs. *Macmaster and Maclellan*, for defendants.

Burbidge, J.]

McHUGH v. THE QUEEN.

[May 7.

Public Work—Bridge—Maintenance—Minister of Public Works—50-51 Vict., c. 16, s. 16 (c).

There is nothing in the Public Works Act (R.S.C. c. 36) in relation to the maintenance and repair of bridges belonging to the Dominion Government, by the Minister of Public Works, which makes him "an officer or servant of the Crown" for whose negligence the Crown would be liable under sub-s. (c) of s. 16 of the Exchequer Court Act.

J. A. Loughheed, Q.C., for suppliant. *E. L. Newcombe*, Q.C., for respondent.

Burbidge, J.]

[May 16.

REG. EX REL. ATTORNEY-GENERAL FOR THE DOMINION v. FITZGIBBON AND THOURET.

Revenue Laws—The Customs Act, s. 192—Penalties—Jurisdiction of Exchequer Court—Discretion of Judge—Remission of Penalty.

The penalty enforceable under the provisions of s. 192 of the Customs Act in the Exchequer Court is a pecuniary one only, the other remedies open to the Crown thereunder cannot be prosecuted in this Court.

2. The Court has no discretion as to the amount of the penalty recoverable under such enactment.

3. If a case is established against any defendant the whole penalty prescribed by the statute must be enforced. The power of remitting such penalty is vested in the Governor in Council by The Audit Act, R.S.C., c. 29, s. 78. In view of this state of the law, it is proper for the Crown, if it sees fit, during the pendency of an action for penalties, to agree upon terms of settlement of the action with the defendant; but those acting on behalf of the Crown should see that the judgment asked for in confirmation of the

~~settlement~~ is for a sum which will vindicate the law and will conserve the public interest.

Solicitor-General and *E. L. Newcombe*, Q.C., for Crown. *Madore* and *Guerin*, for defendants.

Province of Ontario.

HIGH COURT OF JUSTICE.

Street, J.] RE OTTAWA PORCELAIN & CARBON CO. [March 16.

Company—Liquidation—Taxes and water rates—Right to prove for—35 Vict., c. 80, ss. 11, 13 (o), 42 Vict., c. 78, s. 7 (o).

The right to prove a claim for taxes against an incorporated company in liquidation depends upon the right to maintain an action therefor, which right of action only exists when the taxes cannot be recovered in any special manner provided for by the Assessment Act, as, for example, by distress, or sale of land.

Where therefore a claim was made for arrears of taxes against a company in liquidation, and it was shown that before the date of the winding up order the taxes might have been, but were not recovered by distress, the claim was disallowed.

A Board of Water Commissioners by s. 11 of 35 Vict., c. 80 (o) were empowered to fix water rates payable by the owner or occupant of any house or land which were to be a charge thereon; and by s. 13 to make and enforce all necessary by-laws for the collection thereof, and for fixing the time or times and the places for payment, which, on default, was to be enforced by shutting off the water, suit at law, or distress and sale of the occupant's goods. The rights and powers of the water commissioners, including the right to pass necessary by-laws, were transferred to the municipal corporation of a city by 42 Vict., c. 78, and by s. 7 uncollected water rates were made a lien on the premises and made collectable by sale thereof. A by-law was duly passed by the corporation fixing the rates to be paid, and the company were from year to year duly assessed therefor:—

Held, reversing the judgment of the Local Master, that a corporate liability was imposed on the company to pay such rates and a claim therefor constituted, on which the corporation could prove as ordinary creditors.

Shepley, Q.C., for the corporation of Ottawa. *C. J. R. Bethune*, for the liquidator.

Meredith, C. J., Rose, J., MacMahon, J.]

[April 23.

RE LUCAS TANNER & CO.

Assignment for the benefit of creditors—Examination of assignor—Unsatisfactory answers—Committal—R.S.O. (1897) c. 147, s. 36; 58 Vict., c. 23 (O).

The provisions of above section do not apply to acts of the assignor, disclosed on examination as having been done before the date of the passing of the original Act, 58 Vict., c. 23 (O). Judgment of FALCONBRIDGE, J., reversed.

John A. Ferguson and O. A. Langley for appeal. Aylesworth, Q.C., contra. John Cartwright, Q.C., Deputy Attorney-General.

Street, J.]

JAMES v. GRAND TRUNK RAILWAY CO.

[April 27.

Railway—Culvert—Right to fence—Negligence.

A watercourse, which flowed through a culvert under a railway track, became dried up in the summer, and to prevent cattle from passing through it, the railway company had placed gates in the culvert, but which they had neglected to keep up, and by reason of the absence thereof, of which the company was duly notified and required to supply, the plaintiff's cattle, which were pasturing in a field on one side of the track, the watercourse being dried up, got through the culvert into a field on the other side of the track, and from thence on to the railway track where they were injured.

Held, that the railway company was liable for the damages sustained thereby by the plaintiff.

Tetzels, Q.C., and Thompson, for plaintiffs. H. S. Osler, for defendants.

Street, J.]

FARR v. HOWELL.

[April 28.

Mortgage—Conveyance of equity of redemption by mortgagor—Expropriation proceedings—Right of mortgagor to notice of.

A mortgagor who has conveyed away his equity of redemption is not entitled to notice of expropriation proceedings taken by a railway company with regard to part of the mortgaged lands, and therefore the absence of such notice does not constitute any defence to an action brought against him by the mortgagor on a covenant to pay the mortgage money.

D'Arcy Tate, for plaintiff. P. D. Crerar, for defendant.

Divisional Court.]

THOMPSON v. McCRAE.

[May 10.

Division Court—Trial—Adjournment, if costs paid in ten days, otherwise judgment for defendant—New trial—Motion for—Commencement of fourteen days.

Where, at the sittings of a Division Court, a case was "adjourned for

plaintiff on payment of costs within ten days, otherwise judgment for the defendant," the two weeks within which a motion can be made for a new trial, the costs not being paid, does not commence to run until the expiration of the ten days, for until then there is no judgment.

C. C. Robinson, for plaintiff. *Boys* (Barrie), for defendant.

Meredith, C. J.]

RE NILICK *v.* MARKS.

[May 10.

District Courts—New trial—Limitations to fourteen days—Inherent power to grant new trial.

A judge of a District Court in an action in the Division Court within the District, apart from the jurisdiction conferred by s. 152 of the Division Court Act to grant a new trial within the fourteen days thereby prescribed, has not any inherent jurisdiction to set aside a judgment by reason of its having been procured by fraud and to order a new trial; and where the judge so assumed to act, an order for prohibition was granted.

A. Grayson-Smith, for defendant. *McMichael*, for plaintiff.

Boyd, C., Ferguson, J., Robertson, J.]

[May 26.

GIRARDOT *v.* WELTON.

Costs—Counterclaim—Relief obtainable without cross-action—Set-off—Rules 1164, 1165—Order of revivor.

Decision of ARMOUR, C.J., *ante* p. 311, as to the costs taxable by the plaintiff upon a judgment dismissing a so-called counterclaim, affirmed.

Held, also, that such costs were interlocutory costs within the meaning of Rule 1165; and, if not, that they were costs falling within Rule 1164, and subject to the discretion of the taxing officer in setting them off against the defendant's costs of the action.

Held, also, that costs of an order of revivor obtained by the plaintiff after judgment in order to tax his costs, should be taxed to him and added to his other costs and set off against the defendant's costs.

F. E. Hodgins, for the plaintiff. *S. White*, for the defendant Welton.

Armour, C.J., Falconbridge, J., Street, J.]

[June 4.

IN RE NILICK *v.* MARKS.

Division Courts—New trial—Limitation to fourteen days—Inherent power—Fraud.

Decision of MEREDITH, C.J., *ante*, affirmed on appeal.

A. F. McMichael, for the plaintiffs. *Grayson Smith*, for the defendant.

ARMOUR, C.J., STREET. J.,]

[JUNE 13.]

REGINA v. ROCHE.

Municipal corporations—By-law—Transient traders—Conviction—Penalty—Costs—Imprisonment—Distress.

The defendant was convicted before a justice of the peace for that she did on a certain day, and at other times since, occupy premises in the town of B., and did carry on business on said premises by selling dry goods, she not being entered on the assessment roll of the town for income or personal property for the current year, and not having a transient trader's license to do business in the town, as required by a certain by-law of the town; and was adjudged for her offence to forfeit and pay the sum of \$50 (to be applied on taxes to become due) to be paid and applied according to law, and also to pay to the justice the sum of \$11.45 for his costs in that behalf; and if the sums were not paid forthwith, she was adjudged to be imprisoned.

The first clause of the by-law provided that every transient trader who occupied premises in the municipality and who was not entered in the assessment roll, and who might offer goods or merchandise for sale, should take out a license from the municipality. The second clause provided that every other person who occupied premises in the municipality for a temporary period should take out a license. The eighth clause provided for the imposition of a penalty for a breach of any of the provisions of the by-law and that in default of payment of the penalty and costs, the same should be levied by distress, and authorized imprisonment in default of distress.

Held, that the defendant was not brought within either the first or second clause of the by-law, as it was not alleged or charged that she was a transient trader or that she occupied premises in the municipality for a temporary period; and these omissions were fatal to the conviction.

Regina v. Caton, 16 O. R. 11, followed.

Held, also, that the conviction was open to objection because of the application of the penalty, the award of the costs to the justice instead of to the informant, and the award of imprisonment upon default in payment of the penalty.

The conviction was quashed, and costs were given against the informant.

F. J. Roche, for defendant. *G. W. Lount*, for informant.

Boyd, C., Ferguson, J., Meredith, J.]

[June 14.]

KELLY v. DAVIDSON.

Master and servant—Foreman—Negligence—Evidence—Finding of jury.

An appeal by the plaintiff from the decision of MACMAHON, J., ante 214, was allowed with costs, and judgment ordered for the plaintiff for

\$500, the damages assessed by the jury, with costs, the Court holding that there was evidence sufficient to support the finding of the jury in answer to the third question, and that finding could not be interfered with or disregarded.

H. E. Irwin, for plaintiff. *Clute*, Q.C., and *A. R. Clute*, for defendant.

Boyd, C., Ferguson, J., Meredith, J.]

[June 15.

CAMERON v. OTTAWA ELECTRIC R.W. CO.

Trial—Jury—Bias of juror—Relationship to party—Deaf juror—Juror not in panel—New trial—Costs.

The plaintiff was injured in September, 1898, in alighting from a car of the defendants, by reason of a sudden jerk. There was conflicting evidence as to whether the car was in motion when the plaintiff got off. There was an alarm that the car was on fire, which caused the plaintiff to endeavor to alight. She was thrown to the ground and her arm severely hurt. At the trial of an action to recover damages for her injuries a verdict was given for the defendants. The plaintiff asked for a new trial on the ground that the verdict was against evidence, and also upon the ground the foreman of the jury was formerly a shareholder in the defendant company and connected by marriage with persons largely interested in it; also that another jurymen was hard of hearing and did not hear the evidence of plaintiff's witnesses; and also that a third jurymen was not in the panel at all.

Held, that it was essential to the maintenance of public confidence in the jury system, not only that the trial should be fairly conducted, but that it should appear to the parties and those interested to be fairly conducted, and that element was lacking in the present case.

A juror with pecuniary or personal interest in the case of either litigant would do well to disclose this fact at the outset; then, if no objection is made, he can be sworn and try the case without risk of suspicion. In the present conjunction of errors, it was impossible to say that the result had not been effected by the composition of the jury. The trial was not satisfactorily conducted, in regard to the presence on the jury of the three jurymen to whom objection had since been made, and while the plaintiff was not entitled to relief as a matter of right, the discretion of the Court might well be exercised to permit her to have a new trial on payment of costs. Order accordingly; MEREDITH, J., neither concurring nor dissenting.

Aylesworth, Q.C., and *G. F. Henderson*, for plaintiff. *Riddell*, Q.C., and *H. E. Rose*, for defendants.

Province of British Columbia.

SUPREME COURT.

Full Court.]

ROGERS v. REED.

[Jan. 9.

Practice—Security for costs of appeal—How application should be made.

Motion to the full Court at Victoria on 8th January, 1900, for security for costs of appeal from an order under Order XIV.

The application was remitted to Chambers, the court holding that applications for security for costs of appeal to the full Court should be made to a judge in Chambers and not to the full Court.

Full Court.]

[Jan. 15.

ATTORNEY-GENERAL FOR BRITISH COLUMBIA AND THE NEW VANCOUVER
COAL MINING CO. v. ESQUIMALT AND NANAIMO RAILWAY COMPANY.

*Crown, prerogative of—Right of Attorney-General to injunction to restrain
action—Public harbour.*

Appeal from injunction order. On 27th January, 1898, the defendants brought an action against the New Vancouver Coal Mining and Land Company, Limited, for a declaration that they were entitled to the coal under the sea opposite the lands known as the Newcastle Townsite Reserve, claiming them under letters patent from the Dominion dated the 21st of April, 1897. The action was ready for trial and on 5th September, 1899, the Attorney-General for British Columbia and the coal company commenced this present action against the Esquimalt and Nanaimo Railway for a declaration that the right of coal under the foreshore and opposite to Newcastle Townsite Reserve was vested in the Crown in right of the province, and for an injunction to restrain the defendants from further prosecuting their action against the coal company. On the application of the Attorney-General the Chief Justice made an order restraining the further prosecution of the action against the coal company until the determination of this action.

Held, on appeal (MARTIN, J., dissenting), that the order was properly made.

The Supreme Court of British Columbia has all the powers of the Exchequer Court in England, and all the machinery necessary for the exercise thereof.

Per MARTIN, J.: The Crown in right of the Province of British Columbia has no interest in the property in litigation, and is not entitled to exercise any prerogative in relation thereto.

The minerals under the waters and bed of Nanaimo harbour at the time of the Crown grant of 21st April, 1887, were the property of the Dominion. Appeal dismissed.

Bodwell, Q.C., and *Duff*, for appellants. *Davis*, Q.C., for respondent.

Book Reviews.

The Division Courts Act, by BICKNELL & SEAGER. Second edition, Toronto, Canada Law Book Co., 32 Toronto Street.

The above has just been issued from the press and will be welcomed by the profession. It will be referred to more at length hereafter.

The Law of Bailments, by EDWARD BEAL, B.A., Barrister-at-Law, with notes of Canadian cases by A. C. Forster Boulton, Inner Temple and Osgoode Hall, Toronto, Barrister-at-Law. London, Butterworth & Co., 12 Bell Yard, Temple Bar, Law Publishers, 1900.

This is a new book on a most important subject, embracing the law of bailments as to deposits, mandates, loans for use, pledges, hire, innkeepers and carriers. Its value to the Canadian lawyer is largely enhanced by the notes to Canadian cases contributed by Mr. Boulton, and it will be found to be one of the most useful law books of the year. Mr. Beal follows the same plan as pursued by him in his works of Cardinal Rules of Legal Interpretation, viz.: "That of supporting and elucidating general principles, doctrines, propositions and rules by giving, *ipsissimis verbis*, English judicial statements as reported, together with occasional extracts from well-known text-books." This method is an excellent one and the selections have been carefully made by the author. This of course saves a great deal of time and labour and gives to the reader the learning of other writers on the subject discussed without having to consult a number of authors. With a volume of 736 pages of such excellent material we have no cause perhaps to complain that some matters which would seem to come within the scope of the title of the book are not dealt with or only so to a limited extent, and the excellence of the work as a whole disarms criticism. It is gratifying as well as useful to notice the prominence given to Canadian authorities and trust that in future other books published in England may give us the same advantage. The printer and publisher have done their work excellently well.

The Principles of the Interpretation of Wills and Settlements, by ARTHUR UNDERHILL, M.A. and J. ANDREW STRAHAN, M.A., Barristers-at-Law, London: Butterworth & Co., 12 Bail Yard, Law Publishers, 1900.

This is a praiseworthy attempt to write a book on an almost impossible subject, inasmuch as it is almost impossible to lay down any rules except perhaps of the most elementary character. As the Master of the Rolls recently said: "When I see an intention clearly expressed in a will and find no rule of law opposed to giving effect to it I disregard previous cases," and we therefore see how little value are so-called "authorities;" and the editors themselves say that as to the interpretation of wills which are

ambiguous or equivocal in their language, the true way is to form an opinion apart from cases, and then to see whether the cases necessitate the modification of that opinion. The book must necessarily be therefore an attempt to extract from the decisions some broad general principle which will assist the practitioner in the interpretation of ambiguous wills and settlements and to show the reasons which have led to the adoption of these principles. The propositions set out by the authors are clearly stated and with sufficient fullness, and are then illustrated by extracts from modern judgments. The work has no intention of being a compendium of case law, but it will, be found an excellent book for students and for practitioners and counsel wherewith to refresh the memory as to general principles of interpretation.

The Law Quarterly Review, edited by SIR FREDERICK POLLOCK, M.A.; April, 1900. London: Stevens & Sons, 119-120 Chancery Lane.

This number contains the usual notes on recent cases written in the editor's masterly style. There is apparently no branch of the law with which he has not made himself familiar, and in these notes he shows his intimate knowledge of the various subjects therein discussed. The articles in this number are as follows: Penalties for failure to perform within a Limited Time under a Substituted Contract. This comes from Tasmania. Negotiability and Estoppel, a chapter out of the forthcoming work of Mr. John S. Ewart, Q.C., of Manitoba; Negligence in relation to privity of contract, which was published in the *Law Quarterly* simultaneously with its appearance in this journal, written by Mr. C. B. Labatt, of Toronto. In addition to these contributions from various parts of the Colonial Empire, we are given the Near Future of Law Reform, with special reference to the position of legal matters in England; Election between alternative remedies, criticising the conclusion arrived at in *Rice v. Reed* (1900), Q.B. 54; Husband's liability for his wife's torts, and the Married Women's Property Act, discussing recent cases on this much debated subject.

Subject Index to the Books in the Library of the Law Society of Upper Canada at Osgoode Hall, Toronto, compiled by W. G. EAKINS, M.A., Barrister-at-Law, Librarian, 1900.

It is said that the best thing next to knowing the law is to know where to find it. The usefulness of the volume in this respect is manifest. As stated in the preface, pains have been taken to make it as serviceable as possible by entering each work not only under the heading of its known title, but also under such headings as its contents seem to justify. The profession is greatly indebted to Mr. Eakins for this most carefully prepared and useful index, and it will add largely to the value of the Library of our Law Society. This Library, it may be observed, contains some 20,000

bound volumes, of which about 12,000 are reports of cases, 2,000 statutes 800 legal text books, periodicals and works of reference, 3,000 are parliamentary publications, and 5,000 works of general literature, including many encyclopædias and other books of reference.

Kime's International Law Directory.—Edited and compiled by PHILIP GRABURN KIME. London: S. & J. Brawn, 13 Gate Street, Lincoln's Inn Fields, Holborn, W. C. 1900.

This useful directory continues its good work. It contains a representation of selected legal practitioners in most of the principal towns throughout the civilised world, with telegraphic code and short appendix. This edition has undergone complete and careful revision. We need not refer particularly to the need of such a book; every lawyer knows it already. A very useful chapter is the epitome of British and Foreign Colonial Patent Laws, carefully prepared by a gentleman who is evidently familiar with the subject.

Flotsam and Jetsam.

The existing Great Seal being worn out, it has been stated in Parliament that a new Great Seal is to be designed and cut at a cost of about 400l.; and inquiries are being made as to what will become of the present seal when the new one is approved and put into use. Since the time of Elizabeth, though theoretically there might be a Keeper of the Great Seal as distinct from the Chancellor, the two offices have never been full at the same time, and since 1760 no Lord Keeper has been appointed, and the custody of the Great Seal has always been with the Lord Chancellor of Great Britain. He is bound always to have it in his custody, and may not take it out of the realm. Wolsey was impeached for disobeying this rule. But it is said that Lord Brougham took it to Scotland with him, which was perfectly legal, and, when there, used it as a frying-pan to make an omelette.

The practice when a new seal is made is to approve its use by Order in Council; and then the old seal is broken (or in modern practice damasked—*i.e.* given a formal tap with a hammer), and is disposed of at the Sovereign's will—*i.e.* according to inveterate practice as the perquisite of the Lord Chancellor then in office. On this subject also Lord Brougham made the leading case; for he fell out with Lord Lyndhurst on a claim for possession of the seal of George IV. because when the seal was ordered Lyndhurst was in office, and when it was finished and approved Brougham had succeeded him. The King had to give the judgment of Solomon, and present one part of the seal to each of the contesting Chancellors. By the

Crown Office Act and the Orders in Council made under it many grants formerly made under the Great Seal are now made under the Wafer Great Seal.—*Law Journal (Eng.)*

NOT LONG AGO a man who manifested his disapproval of a performance at a place of public amusement in Kansas City, Mo., by hissing, was arrested at the instance of the manager and arraigned before a police magistrate on the charge of disorderly conduct. We are told that the judge promptly discharged the accused with the remark that "If a man has the right to applaud in a theater, he certainly has a right to hiss." This seems to be sound sense, and ought to be equally good law. Applause is the usual mark of approval and its antithesis, the hiss, is the customary way of indicating disapproval of a play, act or scene. The audience is not permitted to give articulate expression to its pleasure or displeasure—no one can get up in the auditorium and give his ideas of the play or the players without imminent danger of being ejected for having disturbed the peace and enjoyment of the remainder of the audience. The spectators are the critics for whose benefit the performance is given, and if the management permit applause on the part of those who are pleased, they should also permit expressions of disapproval by those others who do not like it.—*Albany Law Journal.*

ONE OF THE most novel and curious actions at law we have come across in some time originated not long ago in Stroudsburg, Pa. Among the residents of that city is the Rev. E. E. Dixon, who, in a public prayer, invoked the divine vengeance upon a brewery that had been erected in that town. In his prayer the Rev. Dixon, after calling down curses upon the aforesaid brewery and its proprietors, according to newspaper reports, specifically urged God to strike it with lightning. Sure enough, not long afterward, during a violent storm, a bolt from heaven struck and partially wrecked the building; thereupon the owners brought suit for damages against Mr. Dixon, claiming that through his intercession and appeals the divine wrath had been brought down upon their property. The clergyman, in his answer, it is understood, puts forth the claim that he should not be held responsible for an act of divine providence, and this is the novel question with which the court will be compelled to wrestle. Such a plea would seem to indicate a woeful lack of faith in the power of prayer, yet perhaps it was the only plea he was able to make under the circumstances. The trial of this novel suit, if it ever comes to trial, ought to prove decidedly interesting. The Good Book tells us that all that one needs in order to have his prayers answered is faith. Did the Rev. Dixon possess it, and was that faith potential in calling down the divine vengeance upon the brewery referred to, or was its destruction so soon after the prayer a mere coincidence—one of those strange correspondences with which the busy world is filled? Here is a question which is calculated to cause the average juryman's hair to turn gray.—*Albany Law Journal.*



HON. DAVID MILLS, Q.C.,
MINISTER OF JUSTICE.

Canada News Journal.

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NOS. 13 AND 14.

HON. DAVID MILLS, Q.C.

MINISTER OF JUSTICE.

Hon. David Mills, Q.C., LL.B., Minister of Justice and Attorney General of the Dominion, is one of the best known of our Canadian public men. For almost a third of a century he has taken an active interest in the public affairs of this country, and to-day there is no man in Canadian public life whose opinions on a wide range of questions—legal as well as political and social—are more favourably received than are those of this statesman. A man of strong character, of positive individuality, of kindly disposition yet firm temperament, association with him at once leads to the conclusion that he is fitted by nature and by culture to take a high place in any country, and especially so in this young and growing section of the British Empire. With Puritan and United Empire Loyalists ancestors, he has exemplified in his own career many of the characteristics of the stock from which he sprung.

Mr. Mills is a native of Orford township, in county of Kent, Ontario. Here his father was a successful farmer, and in this section the subject of this sketch still, despite his multitudinous public duties, interests himself in the cultivation of the soil. Born in 1831 and educated at the public and district schools, he taught school for some time, and was subsequently appointed Superintendent of Education, which office he held until he entered public life. Meanwhile, he had attended the University of Michigan, the better to prepare himself for the high position he was destined to occupy. At an early age he won distinction in the national arena. He entered public life 33 years ago, being selected by his friends and neighbours in the electoral county of Bothwell as their representative in the first Parliament of confederated Canada. For thirty years uninterruptedly he represented the constituency, despite the fact that its boundaries were altered so as to take away the petty majority that was polled for him in the earlier contests. After the election of 1896, when he was defeated by a few votes, Mr. Mills was called to the Senate, and a year later, on

the retirement of Sir Oliver Mowat, to become Lieutenant Governor of Ontario, he assumed the portfolio of Minister of Justice and the position of Government leader in the Upper House. For both of these positions Mr. Mills was eminently qualified. Twenty-three years ago he entered the Ministry of Hon. Alex. Mackenzie as Minister of the Interior, and he held that important portfolio till the retirement of this administration from office in 1878. Under him the settlement of the North-West was greatly facilitated; treaties of a just character arrived at by many Indian tribes; and the nucleus of local self-government established. So that, when he was again requested to become a member of the Government of Canada, it was conceded on all hands that the Prime Minister had made an excellent choice, and Mr. Mills' subsequent career as Minister and Government leader in the Senate has amply sustained this view.

Our readers are probably more interested in the career of Mr. Mills as a jurist and as an authority on constitutional and international law. He is a Queen's Counsel of the Province of Ontario, and his name was included in the Dominion list presented to Lord Aberdeen by Sir Charles Tupper in 1896. For a number of years he successfully practised his profession in the city of London, and in 1872 he earned distinction for himself in connection with the definition of the north-west boundary of Ontario, pursuing his researches in support of the claims of the Province not only in Canada and in Great Britain, but at Washington. His professional services were retained in conducting the argument on the subject before the Imperial Privy Council in 1884, and his report was recognized on all hands as a most ably-reasoned and conclusive document. The claims therein made were entirely sustained by the British Privy Council. He was entrusted with other important business by the Ontario Administration—notably, the Indian title case, in which he appeared both before the Court of Appeal and the Supreme Court—and in each case earned praise for the manner in which he accomplished his important task. For a number of years he was editor of the *London Advertiser* and he is also a frequent contributor to the leading magazines. As Professor of Constitutional and International Law in the Provincial University, the Minister of Justice earned the highest respect from all with whom he came into contact, and he has had the satisfaction of seeing many of the students who have profited by

his study, his research and his wisdom, rise to positions of eminence and influence in this and other lands.

The distinguishing characteristic of the Minister of Justice is the care which he invariably takes to master every question that is brought before him. He is not a man who jumps at conclusions, who is easily prejudiced, or who lets preconceived notions guide him. When he takes up a subject he masters it. When he masters it and comes to deal with it, either as Minister of the Crown, before students at the University, in a public lecture, in a magazine article, on the platform or in the arena of parliament, he has the quality, which ought to be much coveted, of being able to explain his views in simple, easily understood language. A case in point was the dispute between Canada and the United States with regard to the Alaskan boundary. Countless speeches had been made on the subject, magazine and newspaper articles had been written by the thousand, all professing to elucidate the question. But how few there were that, amid the technical and involved treatment of the question, could clearly comprehend what it was all about. Then the Minister of Justice gave an interview on the subject; short, concise, plain as could be. It was the Canadian side in a way that could not be misunderstood. It was the putting of the United States at once on the defensive, for it stated the Canadian contention so clearly as to leave no room for quibbling. Leading United States newspapers which, prior to Mr. Mills' statement, had been sceptical about the rights of Canada, candidly confessed that the case as put by the Minister of Justice was apparently unassailable, and unless met, it was conceded that the United States would be placed in a humiliating position.

This is but an illustration of the thoroughness, simplicity and strength of Mr. Mills' style of reasoning and of writing. The same scholarly and statesmanlike methods characterize the whole of Mr. Mills' work, whether as legal adviser of the Crown, as Government leader in the Senate, as Professor of Law, or as student of questions relating first to his own country, secondly to the widely-spread countries forming a portion of the British Empire, and thirdly, to all questions of an international character in which Canada or any other section of the Empire may have a near or remote interest. Mr. Mills has always been a strong believer in British connection and in the benefits derivable from British institutions wherever they are introduced, and in this

connection we may refer to his work, "The English in Africa," giving an account of the circumstances under which British dominion over British territory held in that continent has been secured. This notice of the honourable gentleman may fittingly conclude by a quotation from the book referred to, giving in his own words a clear exposition of his well considered sentiments :

"I have sat for more than thirty years in the Parliament of this country, and I have been impressed with two truths, which I desire to emphasize here, the first is that the service of the Crown is entirely consistent with the service of the people ; and the second is that the highest prosperity of every part of this great Empire can only be reached by the maintenance of its integrity ; I trust then for ages to come, the character and features of the mother, will be found in each of her numerous progeny. The old courage, the old patience, the old constancy, the old faith in the right, the old determination to hold all that we have ; and as a great family among the races of men to remain united, having in our international relations ' one life, one flag, one fleet, one throne,' to all of which we are devoted, and for which we are ready to make whatever sacrifices may be necessary to uphold them and make them now, and always the emblems of freedom and justice among men."

CHANGES IN THE ONTARIO BENCH.

Some important changes in the Judiciary of this Province have, as we go to press, been semi-officially announced, though we do not vouch for their accuracy.

Full of honours and ripe in age, Sir George Burton retires from the Court of Appeal followed by the kindest remembrances of all the members of the Bar who practice in that Court, and with the wishes of many friends that he may be long spared to enjoy the quiet comfort of retirement. For many years he was Judge of the Appellate Court, and on the retirement of the late Chief Justice Hagarty he naturally and properly succeeded to that position. Few men on the Bench to-day command as high a respect and regard as Chief Justice Burton.

Sir George would, it is said, be succeeded by Chief Justice Armour of the Queen's Bench Division ; a man of great mental and physical vigour, a strong reasoner and an able lawyer. The breeziness and rapidity of thought and action which distinguished him at Nisi Prius and in the Divisional Court would not perhaps be without its

helpfulness in the Court of Appeal, which court now enjoys the fullest confidence of the profession. These attributes would naturally be somewhat tempered by the serener atmosphere of an appellate court, where there is a necessity, not only for a careful consideration of the opinions of other judges, but also for that full research and critical scrutiny which were not always possible in the Court below. Chief Justice Armour is 70 years of age. He was called to the Bar in 1853 and appointed to the Bench in November, 1877, and made Chief Justice ten years later.

Mr. Justice Falconbridge, who would succeed Chief Justice Armour, is one of the most popular judges on the Bench, and his appointment would be received with great satisfaction. His exposition of the law is always clear, his judgments to the point, and his grasp of facts perhaps unequalled, certainly not excelled, by that of any of his brother justices. He has an exceptionally calm and even temper, and if he has any prejudices, from which few men are free, they are under strong control. Wise and discreet, he always has been looked upon as a very reliable and satisfactory Judge; and in jury cases particularly, he has no superior. He is 54 years of age, and was appointed a Justice of the Queen's Bench in November, 1887.

As to the vacancy thus created, it is difficult even to speculate how it would be filled. There are several well-known aspirants, but there are others who are much better qualified, if they would but accept a position which unfortunately does not command the highest talent at the Bar.

The writer of the article *Caveat Venditor*, which appears in another place, refers to a matter of great importance, namely, the wisdom of the legislatures of the various Provinces in the Dominion having similar legislation on all matters which touch upon important branches of law which are of general application to trade and commerce, but as to which, under our constitution the various Provinces have the right to legislate, without reference to one another. This was one of the things wherein it was hoped that the Canadian Bar Association might have been of use. The sooner some steps are taken of a practical character in the direction above indicated the better. Possibly the present Minister of Justice may be one to make a move in the matter and succeed in getting the legislative heads of the Provinces together for consultation to agree upon some concerted action in the premises.

A NOTABLE RE-PRINT.

Of all the enterprises which have been undertaken of late years for the purpose of facilitating access to the appalling accumulation of case-law which weighs down the shelves of our libraries, the republication of the English Reports, which has just been announced, will, if we are not mistaken, prove the most useful. As every lawyer knows to his cost, the decisions rendered during the period which elapsed between the discontinuance of the Year Book and the inauguration in 1866 of the present semi-official reports brought out under the management of the Incorporated Council of Law Reporting, are scattered through an immense number of volumes, amounting in all to over 1,000. The merely mechanical part of the labour of research, the most wearisome and unprofitable of all its incidents, has been increased to an almost intolerable degree by the necessity of handling and examining such a portentous mass of printed matter. Other unpleasant aspects of the present condition of things are the inconveniently large amount of shelf-room needed for a complete collection of these reports, and the ruinous price which is demanded for such a collection—about \$9,000—whenever, which is not very frequently, there is one to be had.

To supply in a reduced bulk the contents of this huge pile of books and to bring the whole of them within the reach of men of moderate means, are the aims of the publishers who have projected the new re-print. By taking advantage of all the space-saving expedients of large pages, a type small but remarkably clear, and a specially prepared thin paper they find that the matter in the original 1,000 volumes can be reproduced in 150, which will cost only about one-tenth of the price of the original collection, and require only about one-tenth of the shelf-room for their accommodation. The original paging will be clearly indicated, so that the investigator will have no difficulty in utilizing the present system of citations. This general outline of the scheme is sufficient to show that the project is one which merits, in an eminent degree, the support of the profession. For its details our readers are referred to the prospectus, copies of which can be had upon application to the sole Canadian agents, The Canada Law Book Company, 32 Toronto Street, Toronto, who are one of the promoters of the scheme.

CAVEAT VENDITOR.

Three hundred years ago, when the well-known case of *Chandelor v. Lopus* (1603), 3 Croke Jac., p. 4, was decided, the sale of property, both real and personal, accentuated in a marked manner the difference between the civil law and the common law of England. In the case of the former the cautionary "beware" applied to the vendor; while in the latter the purchaser was thrown upon his guard by the monitory caveat emptor. In Coke upon Littleton, the following distinction was drawn:—"By the civil law every man is bound to warrant the thing that he selleth or conveyeth, albeit there be no express warranty; but the common law bindeth him not, unless there be a warranty either indeed or in law; for caveat emptor." Many important exceptions, favouring the civil law rule, have gradually tended to modify the common law maxim. Chancellor Kent is reported to have said with reference to the rule of caveat emptor:—"If the question was *res integra* in our law, I confess I should be overcome by the reasoning of the civilians."

An eminent English Judge has said of the common law rule: "It is, so far as the sale of chattels is concerned, pretty well eaten up by exceptions." A review of the cases shows by what gradual steps the common law of England has, in a marked degree, reverted to the civil law rule. So far as the sale of real estate, however, is concerned, the change has been comparatively slight.

By the civil law, warranty of title was implied on the part of a vendor on the sale of land, so that, in case of eviction, an action would lay for damages against him at the suit of the vendee. By the common law of England, to use the quaint language of Coke, "If a man buys lands whereunto another hath title, which the buyer knoweth not, yet ignorance shall not excuse him."

When land is leased, there is no implied covenant by the lessor that it is reasonably fit for cultivation or occupation, nor that there is not anything in its state or condition detrimental to health. So, too, when an unfurnished house is let, there is no implied undertaking that it is in a habitable condition. The landlord is also under no implied obligation to do any repairs upon the house, even if it should become uninhabitable during the term for the want of them. If a house is in an unsafe condition, there is no implied duty cast upon the owner to inform the proposed

tenant that it is unfit for habitation. If, however, a house is unfinished, and the landlord undertake to finish it, there is an implied contract on his part to deliver it in a state of repair that renders it tenantable.

On the letting of a furnished house, there is an implied condition that the premises are in a state fit for habitation ; and if it prove to be unfit, the tenant is at liberty to throw it up when he makes the discovery that it is so: *Smith v. Marrable* (1843), 11 M. & W., p. 5. Doubt was subsequently cast upon this decision ; but finally the rule was settled, in 1877, by the decision in *Wilson v. Finch-Hatton*, L.R. 2 Ex. D., p. 336. Chief Baron Kelly, in his judgment, at page 343, is thus reported : " Now, I am prepared to hold that the law as laid down in that case (*Smith v. Marrable*) is good and sound law ; and I may add that although some discussion may have taken place about that case, and although some doubts may have been thrown on the law as there propounded by judges of learning and eminence, still I have no hesitation in holding that it is an implied condition in the letting of a furnished house that it shall be reasonably fit for habitation. I am, therefore, of opinion that, both on the authority of *Smith v. Marrable* and on the general principles of law, there is an implied condition that a furnished house shall be in a good and tenantable condition, and reasonably fit for human occupation, from the very day on which the tenancy is dated to begin, and that where such a house is in such a condition that there is either great discomfort or danger to health in entering and dwelling in it, then the intending tenant is entitled to repudiate the contract altogether."

In the absence of agreement, there is no implied condition on the part of the landlord, in the case of an unfurnished house, that he will do any repairs during the tenancy, nor even that the house will endure during the term.

If the landlord has agreed to keep the premises in repair during the tenancy, there is no implied condition that, should he fail in the performance of the contract, the tenant may throw up the tenancy. In such a case, the tenant will have his remedy over against the landlord.

From a careful examination of the authorities, it would seem the only instance in which the common law rule has relaxed in

favour of the civil law maxim, in the case of realty or that which savours of realty, is that of the lease of furnished apartments.

Passing to the sale of chattels, we find that virtually the exceptions have become the rule, and the old rule has dwindled into the exception. The cause of this return to the civil law rule of caveat venditor arises from the demand for quicker and more confidential intercourse consequent upon the ever-growing increase of trade. In the rush and hurry of business transactions, we are compelled to rely more and more upon the honesty and good faith of the seller. The policy of the law in the furtherance of commercial transactions has created the necessity of uberrimæ fidei on the part of the seller. The rule of caveat emptor arose from the practice of sales in market overt, when the transactions were comparatively few and simple, and the buyer was left to rely upon his own judgment after examination of the article of intended purchase.

We start, then, with the oft-repeated maxim of caveat emptor, as laid down in *Chandelor v. Lopus*, three hundred years ago, that the buyer must be beware, and he purchases at his own risk, unless the seller has given an express warranty. The first exception to this general rule was enunciated by Lord Chief Justice Holt two hundred years ago, namely, that an affirmation at the time of a sale is a warranty, provided it appear in evidence to have been so intended. See judgment of Buller, J., in *Pasley v. Freeman*, 3 T. R., p. 51. The case of *Wood v. Smith* (1829), 4 C. & P., p. 45, affords a good illustration of a qualified warranty. The defendant, on the sale of a mare, having been asked, Is she sound? replied, "Yes, to the best of my knowledge." Then said the plaintiff, "Will you warrant her?" "No," said the defendant, "I never warrant; I would not even warrant myself." It was proved, on the trial, the mare was unsound, and the defendant knew it. Verdict passed for the plaintiff. Bayley, J., on delivering his judgment dismissing the rule for a new trial, said: "The general rule is, that whatever a person represents at the time of a sale is a warranty. But the party may give either a general warranty or he may qualify that warranty. By a general warranty, the person warrants at all events; but here the defendant gives a qualified warranty, as he only warrants the mare sound for all he knows."

A mere representation of that which the seller bona fide believed to be a fact would not amount to a warranty. An

affirmation, however, made absolutely and not as a mere expression of opinion, and intended to form part of the contract, is a warranty.

Behn v. Burness, 3 B. & S., p. 751, is authority for the rule that a representation was of no effect unless it was either fraudulent or a term in the contract. If a term in the contract, it would amount to a warranty. Bramwell, B., in *Stucley v. Baily* (1862), 1 H. & C., at p. 417, is thus reported: "A representation to constitute a warranty must form part of the contract. No doubt there may be a warranty without the word 'warrant' or even 'undertake' being used; if it can be collected from the documents between the parties, or if a reasonable person would understand from what was said by them that they intended that there should be a warranty, there would be one."

In *Irvine v. Godard*, 3 N.B.R., p. 364, the plaintiff bought a quantity of timber, and at the time of the sale the defendant stated "that he knew the timber to be good, and he would make it good; that there had been an opportunity of examining it as it lay on the brow." The timber turned out mostly rotten and worthless. The jury having found for the plaintiff, on motion for a new trial the Court held it was a question for the jury whether the representation amounted to a warranty, and they might infer that a sale took place at the time of such representation.

Tisdale v. Connell, 3 N.B.R., p. 401, was to the like effect. The vendor represented, on the sale of some pine timber, "that the timber was of good quality and uncommon long lengths." The timber having turned out to be of an inferior quality, it was held by the Court, on application to set aside the verdict for plaintiff, that it was a proper question for the jury whether, under all the circumstances, the representation amounted to a warranty.

Great difficulty frequently arises as to whether a representation, statement or assertion made by a vendor at or before the sale is a condition precedent, a breach of which will justify repudiation by the vendee, or an independent agreement which can only form the subject of an action for compensation in damages on failure thereof. It, however, has been considered a safe rule that if the representation is essential, and is so regarded by both parties, it is a condition precedent; if not essential, it is a warranty.

Under the Imperial "Sale of Goods Act, 1893," this question

in each case, is made to depend upon the construction of the contract. Sec. 11, sub-sec. (b) of that Act provides:

"Whether a stipulation in a contract of a sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract."

(c) "When a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or when the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground of rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect."

The judgment of Williams, J., in *Behn v. Burness* (supra) is the most complete analysis of a condition precedent and an independent agreement extant. Blackburn, J., in delivering the judgment of the court in *Bettini v. Gye* (1876), 1 Q.B.D., p. 183, is thus reported: "Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one, or they may think that the performance of some matter apparently of essential importance and prima facie a condition precedent is not really vital, and may be compensated for in damages, and, if they sufficiently expressed such an intention, it will not be a condition precedent."

Courts of law find few subjects more difficult than exactly to define and to give the just weight and significance to the various terms of contracts of sale, such as representation, condition precedent, warranty, independent agreement, implied warranty, warranty in the nature of a condition; also, when a warranty ceases to be a condition precedent, and when a descriptive statement becomes a substantive part of the contract.

Another exception to the general maxim of caveat emptor is where goods are sold by a trader for a particular purpose of which he is aware they must be reasonably fit for the purpose, especially if the buyer necessarily trusts to the judgment or skill of the seller. This principle was very clearly laid down by Lord Ellenborough

in *Gardner v. Gray*, 4 Camp. 144. The defendant sold some bags of waste silk, which on its arrival was found to be of a quality not saleable under the denomination of waste silk. His Lordship, in delivering judgment, said: "The purchaser has a right to expect a saleable article, answering the description in the contract. Without any particular warranty, there is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of caveat emptor does not apply. He cannot, without a warranty, insist that it shall be of any particular quality or fineness; but the intention of both parties must be taken to be that it shall be saleable in the market under the denomination mentioned in the contract between them."

The following broad principle was laid down by Best, C.J., in *Jones v. Bright*, 5 Bing., p. 533: "If a man sells an article, he thereby warrants that it is merchantable—that it is fit for some purpose. This was established in *Laing v. Fidgeon*. If he sells it for a particular purpose, he thereby warrants it fit for that purpose. . . . The law then resolves itself into this—that if a man sells generally, he undertakes that the article sold is fit for some purpose; if he sells it for a particular purpose, he undertakes that it shall be fit for that particular purpose."

Still another exception to the general rule is: If an article is ordered of a manufacturer for a particular purpose, there is an implied warranty that it shall not only be fit for that purpose, but the implied warranty extends to latent as well as to open defects. This was clearly laid down in the case of *Randall v. Newson* (1877), L.R. 2 Q.B.D. 102.

To render the seller liable in such a case, the particular use intended must be made known to him, so as to put upon him the responsibility of furnishing an article reasonably fit for the purpose to which it is to be applied.

From the authorities, the following distinction seems to be drawn: Where a party orders an ascertained article, there is no implied warranty that it is fit for the purpose for which he ordered it: see *Chanter v. Hopkins*, 4 M. & W. 399. If the order, however, is for an undescribed and unascertained thing, stated for a particular purpose, which a manufacturer supplies, there is an implied warranty that it is fit for that purpose.

A sale by sample is still another exception to the general maxim. Such a sale is a silent, symbolical warranty that the

quality of the bulk is equal to the sample. In the case of a sale by sample by a manufacturer, if a latent defect exist in the sample, the manufacturer is liable upon his implied warranty : see *Heilbutt v. Hickson*, L.R. 7 C.P. 438.

The general rule is subject to the still further exception that, where the buyer has no opportunity of examining the goods, there is an implied warranty that they are of a merchantable quality: see *Laing v. Fidgeon*, 6 Taunton 108. See also *Gardner v. Gray*, *supra*.

Further, an implied warranty may be raised on the sale of an article by the custom of a particular trade: *Jones v. Bowden*, 4 Taunton 847.

On the sale of goods for food, there is also an implied warranty that they are fit to be used and consumed.

It will thus be seen that the exceptions, in the case of implied warranties, are so many, as regards quality in the sale of goods and chattels, as to justify the remark of the Judge referred to, that the exceptions have eaten up the rule ; and the maxim should be, Let the seller, and not the buyer, beware.

As to title, the general rule is, the purchaser of a chattel takes it, subject to what may turn out to be informalities in the same : *Cundy v. Lindsay* (1878), 3 Appeal Cases 459. This rule is subject to the following exception : In the case of goods sold in an open-shop or a warehouse, there is an implied warranty on the part of the seller that he is the owner of the goods ; and if it turns out otherwise, as when the goods are claimed by the true owner, from whom they have been stolen, the buyer may recover back the price as money paid upon a consideration which has failed : *Eicholz v. Bannister*, 17 C.B.N.S. 708.

In the sale of a specific chattel, there is no implied warranty of title. The seller, however, is liable in such a case, if he has practised fraud by declaration or conduct : *Morley v. Attenborough*, 3 Ex. 500.

By the provisions of the Sale of Goods Act, 1893, already referred to, these various exceptions have been crystallized into statutory enactment. Sec. 14 of that Act provides :

(1) "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the

course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or trade name, there is no implied condition as to its fitness for a particular purpose :

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality ; provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed :

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade."

Sec. 15, sub-sec. (2) " In the case of a contract for sale by sample—

(a) There is an implied condition that the bulk shall correspond with the sample in quality :

(b) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample :

(c) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample."

The Imperial Act has been founded on the line of the decided cases on contracts of sale for the last two hundred years. It would be the part of wisdom for the Legislatures of the several Provinces to enact similar legislation, thereby securing greater uniformity in the decisions of our Courts, and a fixed standard of reference in this important branch of contractual relations.

SILAS ALWARD.

St. John, N.B.

 ENGLISH CASES.

 EDITORIAL REVIEW OF CURRENT ENGLISH
DECISIONS.

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MISTAKE—MONEY CREDITED BY MISTAKE—RECEIPT IN FULL GIVEN.

In *Ward v. Wallis* (1900) 1 Q.B. 675, the plaintiffs sought to recover a sum of money under the following circumstances. In a prior action the plaintiffs had sued the defendant for work and labour done by them as sub-contractors with the defendant, but, by mistake, had given him credit in their claim for a sum of money received from another person of the same name as the defendant. The defendant paid the balance claimed, and took a receipt in full from the plaintiffs. On the mistake being subsequently discovered by the plaintiffs they brought the present action to recover the amount for which they had erroneously given credit, and in the alternative for money had and received by the defendant to their use. Kennedy, J., although of opinion that prima facie the settlement of the claim in the former action would be a bar to re-opening it in any subsequent action where the parties had acted in good faith, was nevertheless of opinion that the settlement was not conclusive when there was a lack of bona fides, and he was of opinion that the defendant had not acted in good faith in taking advantage of the mistake of fact made by the plaintiff, and that the allowance in account was equivalent to payment, and that the plaintiffs, notwithstanding the settlement of the former action, were entitled to recover the amount claimed as money had and received to the plaintiffs' use. He, therefore, gave judgment in favour of the plaintiffs with costs.

CONTRACT—CHARTER PARTY—CONTRACT TO LOAD "A CARGO OF SAY ABOUT 2800 TONS."

Miller v. Borner (1900) 1 Q.B. 691 is an action which turns on the construction of a charter party whereby the charterer undertook to load "a cargo of ore, say about 2800 tons." The actual capacity of the ship was 2880 tons and the charterer loaded 2840 tons. Channell and Bucknill, JJ., held that the contract differed

from that in question in *Morris v. Levison*, 1 C.P.D. 155, where the charterer bound himself to load "*a full and complete cargo*, say about 1100 tons," and that the charterer had in this case fulfilled his contract, and that the question of what was meant by "about" ought not to be left to the jury.

VENDOR AND PURCHASER—DEPOSIT, RECOVERY OF, BY PURCHASER—CONDITION TO BE PERFORMED BY VENDOR—TIME FOR PERFORMANCE OF CONDITION—DATE OF COMPLETION—CONSENT OF THIRD PARTY.

Smith v. Butler (1900) 1 Q.B. 694 was an action by a purchaser to recover his deposit on the ground of the failure of the vendor to perform a condition subject to which the contract of sale had been made. The sale was of a parcel of land on which there was a subsisting mortgage, on condition that the consent of the mortgagee should be obtained to the same amount remaining outstanding on the mortgage as was then due. A date was fixed for completion, and a deposit paid, which was to be forfeited if the sale went off through the default of the plaintiff. Before the day fixed for completion, at an interview between the plaintiff, the defendant, and the mortgagee, the latter would only consent to a lesser sum remaining on mortgage. The plaintiff, therefore, treated the contract as at an end. Subsequently, and before the day fixed for completion, the defendant procured the mortgagee's consent to the full amount remaining on mortgage, but the plaintiff refused to proceed with the purchase, and brought the present action to recover his deposit. The action was tried by Bucknill, J., who gave judgment for the plaintiff. The Court of Appeal (Smith, Collins and Romer, L.JJ.), however, unanimously reversed his decision, holding that the plaintiff was not justified in treating the contract as off, on the mortgagee's refusal to consent, inasmuch as the time for completion had not then arrived, and the vendor had until the day fixed for completion in which to get him to consent to the proposed arrangement, and having done so, the plaintiff was bound to have carried out the contract, and not having done so it had fallen through by his default, and, therefore, his deposit was forfeited.

BILL OF LADING—DESCRIPTION OF GOODS—"MARKED AND NUMBERED AS IN THE MARGIN"—MISTAKE—BILLS OF LADING ACT, 1855 (18 & 19 VICT., C. 11), S. 3—(R.S.O. C. 145, S. 5 (3)).

Parsons v. New Zealand Shipping Co. (1900) 1 Q.B. 714, was an action by consignees of certain goods covered by a bill of lading

to recover damages against the shipowners for short delivery. The goods referred to in the bill of lading were described as "marked and numbered as in the margin," and the question of law in the case was whether the shipowners were entitled to show, notwithstanding the Bills of Lading Act, 1855 (18 & 19 Vict. c. 11) s. 3, (R.S.O. c. 145, s. 5 (3)), that some of the goods intended to be covered by the bill of lading were by mistake incorrectly described in the margin of the bills of lading, and were shipped as part of the total quantities shipped under such bills of lading, and that the defendants were entitled to offer, and the plaintiff was bound to accept, such goods as part of the plaintiff's consignment, notwithstanding the erroneous description. The plaintiff contended that under the Act the bills of lading were conclusive as to the description of the goods, and that the defendants were not entitled to set up an alleged mistake in the marginal description. Kennedy, J., however, held that the Act is not conclusive as to the marks where the marks do not affect or denote substance, quality, and commercial value, and the marks in the present case not having that effect, he held that the defendants were, therefore, entitled to show the mistake, and to require the plaintiff's acceptance of the goods thus erroneously described.

EXPROPRIATION—COMPENSATION—INJURIOUS AFFECTON—INTENTION TO USE LAND FOR SPECIAL PURPOSE.

Bailey v. Isle of Thanet Ry. Co. (1900) 1 Q.B. 722, was a case stated by an arbitrator appointed under the Land Clauses Act for the purpose of fixing the compensation for land expropriated by the defendants for the purposes of their railway. The land in question was part of a parcel which had been acquired by the plaintiff for the purpose of erecting thereon a school, for which purpose it was specially adapted. No steps had been taken up to the time of the expropriation towards erecting the school. In consequence of the construction of the railway the part of the land not taken was rendered less suitable for a school, and there was no other site in the neighbourhood equally suitable for the purpose. The question on which the opinion of the Court was desired was whether these facts ought to be taken into consideration in fixing the compensation. Channell and Bucknill, JJ, were of opinion that the intention of the owner to use the land for a particular purpose ought properly to be taken into account.

LORD'S DAY ACT—(29 CAR. 2, C. 7, S. 1)—EXERCISING "WORLDLY LABOUR, BUSINESS OR WORK" ON SUNDAY.

In *Palmer v. Snow* (1900) 1 Q.B. 725, Channell and Bucknill, JJ., on a case stated by a magistrate as to whether a barber was within the provisions of the Lord's Day Act (29 Car. 2, c. 7 s. 1), which forbids work on Sundays by any "tradesman, artificer, workman, labourer, or other person whatsoever," came to the conclusion that the general words of the section must be confined to persons ejusdem generis as those specifically enumerated, and that a barber did not, therefore, come within them.

DISTRESS—EXEMPTION—"BEDDING."

In *Davis v. Harris* (1900) 1 Q.B. 729, under a statute exempting from distress certain property of the tenant, inter alia, "bedding," it was held by Channell and Bucknill, JJ., that the word "bedding" included "bedstead." The Ontario Acts relating to exemptions from execution and distress expressly include "bedsteads": see R.S.O. c. 77, s. 2; c. 170, s. 30.

APPORTIONMENT—RENT PAYABLE IN ADVANCE—APPORTIONMENT ON EVICTION—APPORTIONMENT ACT, 1870 (33 & 34 VICT., C. 35) S. 2—(R.S.O. c. 170, s. 4.)

In *Ellis v. Rowbotham* (1900) 1 Q.B. 740, the defendant, a tenant whose rent was payable in advance, was sued for an instalment of rent; he had been evicted for non-payment of such instalment under the terms of the lease, and claimed that under the Apportionment Act, 1870, (33 & 34 Vict., c. 35) s.2.—(R.S.O. c. 170, s. 4) notwithstanding that the rent was payable in advance, that he was only liable for a proportionate part which would fall due de die in diem up to the day of his eviction. The Court of Appeal (Smith, Collins, and Romer, L.JJ.,) affirmed the judgment of Kennedy, J., in favour of the landlord, holding that in such a case, the rent being payable in advance, there is no right of apportionment, although Collins, L.J., confessed to having some doubt.

HIGHWAY—TRESPASS TO LAND—USE OF HIGHWAY FOR PURPOSE OTHER THAN TRAVEL.

Hickenson v. Maisey (1900) 1 Q.B. 752, was an action of trespass in which the facts were as follows: The plaintiff was possessed of land traversed by a highway. A trainer of horses had agreed with the plaintiff for the use of some of his land for the training and

trial of race horses. A view of the land so used could be obtained from the highway on the plaintiff's land. The defendant was one of the proprietors of a paper which published accounts of the doings of race horses, and for the purpose of getting information as to the performances of horses being trained on the plaintiff's land the defendant walked backwards and forwards on the highway on the plaintiff's land about fifteen yards in length for about an hour and a half, watching and taking notes of the trials of race horses on the plaintiff's land. The plaintiff brought an action against the defendant for trespass in thus using the highway, and the jury found a verdict for the plaintiff, and Day, J., who tried the action, gave judgment for the plaintiff and granted an injunction to restrain further trespass by the defendant. On appeal from that judgment the Court of Appeal (Smith, Collins, and Romer, L.JJ.) following *Harrison v. Rutland* (1893) 1 Q.B. 142, (noted ante vol. 29, p. 178), affirmed the decision. Owing to the difference of the law in Ontario respecting the ownership of the freehold of highways, (see R.S.O. c. 223, ss. 599, 601), it would seem that this case would have but a limited application in Ontario.

PARTNERSHIP—DISSOLUTION—FIRM NAME OF DISSOLVED PARTNERSHIP, RIGHT TO USE—SOLICITORS' BUSINESS.

In *Burchell v. Wilde* (1900) 1 Ch. 551, the right of the partners of a dissolved firm to use the name of the firm is discussed. In this case the business carried on by the firm was that of solicitors. It was formed in 1882 and was composed of Wm. Burchell, senior, and Wm. Burchell, junior, W. G. Wilde, the defendant, and J. W. Burchell and C. T. D. Burchell, the plaintiffs, and the business was carried on under the name of "Burchells." In June, 1893, William Burchell, senior, died and Wm. Burchell, junior, retired, and the other members of the firm agreed to carry on the business under the style of "Burchell & Co." In 1899 the partnership was dissolved by consent, there being no sale of the good will or assets, and no provision as to the use of the firm name. The plaintiffs then proceeded to carry on business in the office of the old firm as "Burchell & Co.," and the defendant, W. G. Wilde, and his son, whom he had taken into partnership, carried on business at a new office as "Burchell & Co." The plaintiffs brought the action to restrain the Wildes from using the name of "Burchell" or "Burchells" in anyway as part of their firm name. On a motion for

an interim injunction, Byrne, J., held that the plaintiffs were not entitled to an injunction unless they could show that there was, or was likely to be, some substantial risk of a liability being cast on them by reason of the defendant's use of the former firm name, and as this was not shown, he refused to make any order, and his judgment was affirmed by the Court of Appeal (Lindley, M.R., and Rigby, and Williams, L.JJ.,) although the latter court expressed the opinion that it would be more satisfactory if the defendants would continue to use (as they had done since the hearing before Byrne, J.) the name of "Burchell, Wilde & Co.," but this was presumably by way of advice only, and not in any way a decision that they were bound so to do, or to abstain from using the name of "Burchell & Co."

PATENT—INFRINGEMENT—INFRINGEMENT ARTICLES SENT ABROAD.

British Motor Syndicate v. Taylor (1900) 1 Ch. 577, was an action brought to restrain the infringement of the plaintiff's patent. The plaintiff obtained judgment with a reference to assess damages. On the reference it appeared that the defendants had purchased articles in England infringing the patent, and had transmitted them for sale to the defendant's branch business house in Paris. The Master assessed the damages on the basis that such articles constituted an infringement, and on appeal Stirling, J., affirmed his ruling holding that the transport of the articles within the United Kingdom under the circumstances was "making use" of the invention within the meaning of the patent, and constituted an infringement thereof. The Master had assessed the damages at £8 for each infringing article, but Stirling, J., on a review of the evidence, was of opinion that the damages allowed were too high, and reduced the amount to £5 per article.

LUNATIC—CONTRACT TO PURCHASE LAND—VOIDABLE CONTRACT—COMPLETION OF PURCHASE BY COMMITTEE—CONVERSION.

In *Balwyn v. Smith* (1900) 1 Ch. 588, the point to be settled was whether or not there had been a conversion of a lunatic's estate from personalty to realty. The facts being that the lunatic while of unsound mind had entered into a contract to purchase a parcel of land. He was subsequently declared a lunatic, and a committee appointed who was authorized by the court to complete the purchase, which was accordingly done, and the purchase money was

paid out of the lunatic's personal estate. The lunatic having died intestate, his next of kin claimed that the land passed as personal estate, but Byrne, J., was of opinion that the contract in the first place having been voidable, nevertheless when affirmed and adopted by the court on the lunatic's behalf, related back to the time it was made, with the necessary legal consequences ensuing from it, and that therefore there had been a conversion, and the claim of the next of kin failed and the action was dismissed with costs.

EASEMENT—USER OF EASEMENT FOR 40 YEARS—WAY—PAYMENT OF MONEY ANNUALLY FOR USE OF EASEMENT—PAROL AGREEMENT—PRESCRIPTION ACT (2 & 3 W. 4, c. 71,) s. 2—(R.S.O. c. 133, s. 35)—“CLAIMING RIGHT THERETO.”

In *Gardner v. Hodgson's Kingston Breweries Co.* (1900) 1 Ch. 592, the plaintiff claimed a declaration that he was entitled to a right of way over certain premises of the defendant and a right to use a pump thereon, and also an injunction to restrain the defendants from obstructing the plaintiff's use and enjoyment thereof. It appeared by the evidence that the plaintiff and his predecessor in title had for upwards of sixty years enjoyed the easement claimed without interruption, and that they had at least from 1853 paid a yearly sum of 15s. to the owner of the defendant's premises for the use of the way, but there was no evidence of any consent or agreement in writing to allow the use of the way. Cosens-Hardy, J., under these circumstances was of opinion that the plaintiff had established an actual user by a person “claiming right thereto without interruption” of the way in question within the meaning of the Prescription Act, s. 2—(R.S.O. c. 133, s. 35), and that the payment of the annual sum of 15s. - was no “interruption” so as to prevent the acquisition of a right by actual enjoyment, and as no agreement or consent in writing was found, the plaintiff's right to the way had become under the section indefeasible, and he granted the plaintiff the relief claimed with costs.

RECEIVER—DEBENTURE HOLDERS—CHARGE ON PROPERTY IN FOREIGN COUNTRY—FRENCH DEBT—DEBT, LOCALITY OF—CONTEMPT.

In *re Maudslay, Maudslay v. Maudslay* (1900) 1 Ch. 602. The plaintiffs were debenture holders of a limited company, having a charge upon all its assets, among which was a debt due to the company by a French firm. The plaintiffs, for the purpose of

enforcing payment of their debentures, had procured the appointment of a receiver of all the company's assets, and the question raised in the present application was, whether certain English creditors of the defendant company who had taken proceedings in France to attach the debt due by the French firm, were thereby guilty of contempt of court, on the ground of such proceedings being an interference with the receiver. Cosens-Hardy, J., was of opinion that the English creditors were not guilty of any interference with the receiver, on the ground that, although the plaintiff's charge on the French debt was valid according to English law, yet the appointment of a receiver by an English court for enforcing such charge required, so far as the French debt was concerned (which must be treated as situate in France and subject to French law), to be supplemented by proceedings in a French court in order to put the receiver in possession, and until that was done, and the receiver had acquired a right to the debt under French law, it was open to any creditor of the company, not a party to the suit in which the receiver is appointed, to take any proceedings allowed by French law to attach such debt, and he therefore held that the attachment of the debt in the French court, which alone was recognized by the law of France as giving a legal title to such debt, must prevail over the title of the debenture holders.

LEASE, AGREEMENT FOR—LESSEE NOT NAMED—STATUTE OF FRAUDS—MEMORIAL IN WRITING, SUFFICIENCY OF.

Carr v. Lynch (1900) 1 Ch. 613, was an action for specific performance of an agreement for a lease, in which the sole question was whether the intended lessee was sufficiently defined in the agreement. One Jayne was the assignee of a subsisting lease of the premises, and on 30th December 1898, he paid the defendant, the lessor, £50, and took from him a memorandum dated on that day, which so far as is material to the case was as follows: "Dear Sir,—In consideration of you having this day paid me the sum of £50 I hereby agree . . . to grant you . . . a further lease of 24 years . . . of the Warden Arms . . . to run immediately after the expiration of . . . the now existing lease . . ." The name of the intended lessee not being stated in the memorandum. Farwell, J., held that the proposed lessee was sufficiently identified as being the person who had paid the £50—and that the memorandum satisfied the statute, and he gave judgment for the plaintiff, the assignee of Jayne, with costs.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

B.C.]

JOHNSON *v.* KIRK.

[June 12.

Registry law—Registration of tax deeds—Certificate of title—Priority over earlier certificate.

Sec. 13 of the British Columbia Land Registry Act (R.S.B.C. c. 111) provides that a person claiming ownership in fee of land may apply for registration thereof, and the Registrar, on being satisfied after examination of the title deeds, that a prima facie case is established, shall register the title in the "Register of Absolute Fees." Sec. 19, which authorizes the Registrar to issue a certificate of title to the person so registering, contains this provision: "Every certificate of title shall be received as prima facie evidence in all courts of justice in the Province, of the particulars therein set forth." And by sec. 23: "The registered owner of an absolute fee shall be deemed to be the prima facie owner of the land described or referred to in the register for such an estate of freehold as he may possess." . . .

Held, affirming the judgment of the Supreme Court of British Columbia (7 B.C. Rep. 12, sub nom *Kirk v. Kirkland*) that a certificate of title issued on registration of a deed from the assessor of taxes to a purchaser at a tax sale does not of itself oust the prior registered owner of the land described in the register, but the holder must prove that all the statutory provisions to authorize a sale for taxes had been complied with. Appeal dismissed with costs.

Gormully, Q.C., and *Orde*, for appellant. *J. Travers Lewis*, for respondent.

Yukon Ter.]

O'BRIEN *v.* ALLEN.

[June 12.

Constitutional law—Government of Yukon—Franchise over Dominion lands—Exaction of tolls.

In 1898 the Executive Government of the Yukon Territory granted to appellants the privilege of building a toll tramway or waggon road, or partly both, between certain points in the territory, which road, when constructed, passed largely through Dominion lands. The respondents, who were in the express and carrying trade, being obliged to take freight over said tramway, had to pay a toll of one-half cent per pound thereon and

brought an action against appellants for repayment of the amount so exacted, claiming that they had a right to the free use of these public lands. The action was tried before Mr. Justice Dugas, who held that as the franchise of appellants had not been confirmed by the Interior Department which had control over and management of Dominion lands, the appellants had no right to exact the tolls. On appeal from this judgment—

Held, reversing the judgment appealed from, that the Commissioners in Council of the Yukon had the same powers to make laws for the Government of the Territory as were possessed by the Lieutenant-Governor and Legislature of the North-West Territories, and substantially the same as the Executive in the other Provinces; that the building and operating of tramways is wholly a matter of provincial jurisdiction; and that the ownership of the soil could only be brought in question in this case by the Crown. Appeal dismissed with costs.

Aylesworth, Q.C., and McGiverin, for appellants. The appeal was prosecuted ex parte.

Ont.] THOMPSON *v.* MATHESON. [June 12.
Contract—Sale of lumber—Inspection.

A contract for the sale of lumber was made wholly by correspondence, and the letter which completed the bargain contained the following provision: "The inspection of this lumber to be made after the same is landed here" (at Windsor) "by a competent inspector to be agreed upon between buyer and seller and his inspection to be final."

Held, reversing the judgment of the Court of Appeal, that it was not essential for the parties to agree upon an inspector before the inspection was begun; and a party chosen by the buyer having inspected the lumber and before his work was completed the seller having agreed to accept him as inspector, the contract was satisfied and the inspection final and binding on both parties. Appeal allowed with costs.

Riddell, Q.C., for appellant. *Aylesworth, Q.C.*, and *Smith*, for respondent.

Ont.] LAKE ERIE & DETROIT RIVER RAILWAY *v.* BARCLAY. [June 12.
Negligence—Railway accident—Shunting cars—Warning—Proof of negligence.

B., in driving towards his home on a night in September, had to cross a railway track between 9 and 10 o'clock on a level crossing near a station. Shortly before a train had arrived from the west which had to be turned for a trip back in the same direction and also to pick up a passenger car on a siding. After some switching the train was made up and just before coming to the level crossing the engine and tender were uncoupled from the cars to proceed to the round house. B. saw the engine pass, but apparently failed to perceive the cars, and started to cross when he was struck by the latter and killed. There was no warning of the approach

of the cars which struck him. In an action by his widow under Lord Campbell's Act the jury found that the Railway Co. was guilty of negligence and that a man should have been on the crossing when making the switch to warn the public. A verdict for the plaintiff was sustained by the Court of Appeal.

Held, affirming the judgment of the Court of Appeal, GWYNNE, J., dissenting, that it was properly left to the jury to determine whether or not, under the special circumstances, it was necessary for the Co. to take greater precautions than it did and to be much more careful than in ordinary cases where these conditions did not exist; and that the case did not raise the question of the jury's right to determine whether or not a railway company could be compelled to place watchmen upon level highway crossings to warn persons about to cross the line. Appeal dismissed with costs.

Riddell, Q.C., and *Coburn*, for appellants. *Wilson*, Q.C., and *Gundy*, for respondent.

Province of Ontario.

COURT OF APPEAL.

From Armour, J.]

UFFNER v. LEWIS.
BOYS' HOME v. LEWIS.

[May 7.]

Executors and administrators—Trustees—Distribution of estate—Unpaid legatee—Contribution by other legatees—Limitation of actions.

Legatees entitled to a share of the residue of an estate are not bound by the accounts and proceedings in an administration action instituted by other residuary legatees in which they have not been added as parties, and of which they have received no notice. The judgment in such an action however enures to their benefit, and makes a fresh starting point in their favour as against the defence of the Statute of Limitations.

Per MACLENNAN, J.A.—In the absence of reasonable efforts by the executors of an estate to discover the whereabouts of persons entitled to share in the residue, they are not protected if they, even under the order and direction of the court, distribute the residue among the other persons entitled.

Per CUR.—Persons who have received a share of the residue under such circumstances must refund for the benefit of the persons whose claims have been ignored the amount received in excess of the sum payable if the division had been properly made. Judgment of ARMOUR, C.J., affirmed.

Armour, Q.C., and *W. Bell*, for Lewis and Morgan. *Teetzel*, Q.C., for the Boys' Home. *D'Arcy Tate*, for respondents.

From Off. Arb.]

[May 15.]

IN RE McLELLAN AND TOWNSHIP OF CHINGUACOUSY.

Ditches and Watercourses Act—Municipal corporations—Compensation.

A municipal corporation is an "owner," within the meaning of the Ditches and Watercourses Act, of highways under its jurisdiction and as such may initiate proceedings under that Act.

Where it has, pursuant to an award in proceedings initiated by it under that Act, constructed, without negligence, a drain from a highway to a river through an adjoining owners' land, it is not liable to make compensation under the Municipal Act to that adjoining proprietor on the ground that his land has been injuriously affected by the drain. Judgment of the Official Arbitrator reversed.

Shepley, Q.C., and *A. McKechnie*, for appellants. *T. J. Blain* and *D. O. Cameron*, for respondent.

From Meredith, C.J.]

[May 15.]

ONTARIO LANTERN COMPANY v. HAMLTON BRASS COMPANY.

Contract—Manufacture and sale of chattels—Breach—Damages.

Five days after making a contract with the plaintiffs for the manufacture by them of a large number of shells for electric light lamps, to be delivered monthly for a period of twenty months, the defendants notified the plaintiffs that they would not carry out the contract.

Held, that though the plaintiffs were entitled to bring an action at once to recover damages, they should not be allowed as damages the full amount of their expected profit, but that allowance should be made for the many contingencies which might have happened before the time for fulfilment.

The court, after stating the general principles and pointing out some of the contingencies, reduced the amount of damages allowed by MEREDITH, C.J.

Lynch-Staunton, Q.C., for the appellants. *D'Arcy Tate*, for the respondents.

From Street, J.]

CLIFTON v. CRAWFORD.

[May 15.]

Will—Construction—Legacy—Survivorship—Accruer.

A testator gave a legacy of \$500 to each of three grandchildren, William, Thomas and Zilla, and directed "the said moneys so bequeathed to be kept invested by my executors and the same with accrued interest to be paid over to the said William and Thomas on their attaining their majority, and the said legacy to my said granddaughter Zilla to be paid to her with the interest accrued thereon on her attaining her majority or on her marriage, which ever event shall first happen. In case of the death of any one of my said grandchildren the bequests and legacies to them in this

my will contained shall be divided among and go to the survivor or survivors of them share and share alike." William died under age and unmarried, and then Zilla died under age and unmarried.

Held, that the legacies to William and Zilla became divested by their death before the time for payment and became vested in Thomas, and that Zilla's representatives were not entitled to one-half of William's legacy which v in her contingently upon his predeceasing her. Judgment of STREET, J., reversed.

B. F. Justin, for appellants. *B. N. Davis* and *J. E. Cook*, for respondents.

From Robertson, J.]

[May 15.

CONFEDERATION LIFE ASSOCIATION *v.* LABATT.

Sale of goods—Want of title—Damages.

The purchaser of a chattel is entitled to recover from the vendor upon failure of title the value of the chattel, and not merely the amount paid by him to the vendor. Judgment of ROBERTSON, J., reversed in part.

Shepley, Q.C., and *W. H. Irving*, for appellants. *Aylesworth*, Q.C., and *Rowell*, for respondent Labatt. *Russell Snow*, for plaintiffs.

From McMahon, J.] UNION BANK *v.* CODE.

[May 15.

UNION BANK *v.* MORRIS.

Company—Shares—Issue at a discount—Payment for services—Transfer—Certificate—R.S.C. c. 119, ss. 27, 48, 55.

Where shares in a company incorporated under the Dominion Joint Stock Companies Act, R.S.C. ch. 119, were issued as paid up shares, but part of the alleged payment consisted of an amount allowed by the company to the shareholders for services which by a contemporaneous agreement they agreed to render to the company, it was held, in a judgment creditor's action, that the shares, to the extent of the amount so allowed, must be treated as unpaid shares. Judgment of MACMAHON, J., affirmed.

Where without any transfer being executed certificates were, on the application of the transferor, issued by the company to the alleged transferee, it was held, having regard to the Act and the by-laws of the company, that the alleged transfer was ineffectual and that the transferor remained liable to the company's creditors. Judgment of MACMAHON, J., reversed.

D. W. Saunders and *E. C. Cattnach*, for plaintiffs. *Watson*, Q.C., and *J. B. Noble*, for defendants.

From Falconbridge, J.]

[May 15.

INCE *v.* CITY OF TORONTO.

Municipal corporations—Highways—Damages—Ice—Negligence—"Gross negligence."

"Gross negligence" in s. 606 (2) of the Municipal Act, R.S.O. c. 223,

means at the least "great negligence," and when it is attempted to make a municipal corporation responsible in damages under that sub-section for an accident caused by ice on a sidewalk it must be shown that the sidewalk was allowed to remain in a dangerous condition for an unreasonable time.

If the sidewalk has been constructed in accordance with the plans of competent engineers and is in good repair, the possibility of an improved or less dangerous plan of construction is not an element to be considered in deciding the question of the municipality's gross negligence.

Where there was a sudden change in temperature about six in the morning and ice then formed on the sidewalk in question it was held that the municipality, in the absence of actual notice of its dangerous condition, were not liable in damages for an accident which happened about eleven o'clock on the same morning. Judgment of FALCONBRIDGE, J., reversed.

Fullerton, Q.C., and W. G. Chisholm, for appellants. Aylesworth, Q.C., and C. A. Moss, for respondent.

From Divl. Court.]

[May 15.]

BOLLANDER v. CITY OF OTTAWA.

Municipal corporations—Market—Auctioneer—"Regulating and governing"—R.S.O. c. 223, ss. 580, 583 (2).

Neither under section 580, nor under section 583 (2), of the Municipal Act, R.S.O. ch. 223, can a municipal corporation prohibit an auctioneer from carrying on his business in the public markets of the city in respect of any commodities which may properly be sold there. Judgment of a Divisional Court, 35 C.L.J. 27, 30 O.R. 7, affirmed.

Leighton McCarthy, for appellants. G. F. Henderson, for respondent.

From Robertson, J.]

SNIDER v. MCKELVEY.

[May 15.]

Contract—Breach—Agreement not to practice medicine—Damages—Injunction.

By an agreement under seal the defendant sold to the plaintiff a house and the good will of his medical practice for \$2,100, and the defendant "(bound) himself in the sum of \$400, to be paid to the (plaintiff), in case the (defendant) shall set up or locate himself in the practice of medicine or surgery within the space of five years from the date hereof within a radius of five miles from the said village."

Held, that the sum of \$400 was payable as liquidated damages, and that the plaintiff, on the breach of the agreement, was entitled to that sum or to an injunction, but not to both. Judgment of ROBERTSON, J., 35 C.L.J. 610, 31 O.R. 91, varied.

Garrow, Q.C., for appellant. W. M. Sinclair, for respondent.

From Falconbridge, J.]

[May 15.

WILSON v. OWEN SOUND PORTLAND CEMENT CO.

Master and servant—Workmen's compensation for injuries Act—Defect in machinery—Want of notice of accident.

A machine, perfect in itself is, if applied to some purpose for which it is unfitted, defective within the meaning of s. 3 (1) of the Workmen's compensation for injuries Act, R.S.O. c. 160

To state in the defence that notice of the accident has not been given and that the defendants intend to rely on that defence is not sufficient. Formal notice must be given in accordance with the provisions of section 14. *Cavanagh v. Park* (1896), 23 A.R. 715, applied. Judgment of FALCONBRIDGE, J., affirmed.

J. M. Kilbourn, for appellants. *A. G. Mackay*, for respondent.

From McDougall, Co. J.]

[May 15.

GEARING v. ROBINSON.

Mechanics' lien—"Owner"—R.S.O. c. 153, s. 2, sub.-s. 3.

A person is not an "owner," within the meaning of above sub-section, and as such liable in mechanics' lien proceedings for work done or materials placed upon land in which he has an interest, unless there is something in the nature of a direct dealing between the contractor and the person whose interest is sought to be charged. Mere knowledge of, or consent to, the work being done or the materials being supplied, is not enough; there must be a request, either express, or by implication from circumstances, to give rise to the lien. Judgment of McDUGALL, Co. J., reversed.

Shepley, Q.C., for appellants. *E. E. A. DuVernet* and *D. C. Ross*, for the respondent the plaintiff. *R. C. LeVesconte*, for the respondents, the Robinsons.

From Meredith, C.J.]

[May 15.

ECKARDT v. LANCASHIRE INSURANCE CO.

Fire insurance—Co-insurance condition—R.S.O. c. 203, s. 171.

Per OSLER, MACLENNAN and LISTER, JJ. A. The condition commonly known as the "co-insurance condition" cannot be held to be "not just and reasonable" within the meaning of above section when the premium is reduced in consideration of its insertion.

Per BURTON, C.J. O. and MOSS, J. A. In the absence of evidence that the insured, in consideration of the reduced premium, elected to take a policy with this condition it must be held to be prima facie "not just and reasonable," and not binding upon him. In the result the judgment of MEREDITH, C.J., 29 O.R. 695, was affirmed.

Lash, Q.C., and *A. W. Anglin*, for appellants. *Osler*, Q.C., and *Creelman*, Q.C., for respondents.

HIGH COURT OF JUSTICE.

Rose, J.]

IN RE VERNON.

[June 7.

*Lunatic—Maintenance—Moneys on deposit—Attachment by creditor—
Payment into Court.*

A motion by the committee of a lunatic for an order directing the Canadian Bank of Commerce to pay into Court, for the purpose of application for the lunatic's benefit, certain moneys deposited to the credit of the lunatic. The moneys had been attached by a creditor of the lunatic, to whom notice of this application was given.

J. W. McCullough, for the committee.

J. D. Montgomery, for the creditor, opposed the application.

J. F. Edgar, for the Inspector of Prisons and Public Charities.

ROSE, J.—In *Wood v. Joselin*, 18 A.R. at p. 60, Mr. Justice Osler said: "It is clear that the service of the garnishee summons does not create, as between garnishor and garnishee, any debt, either at law or in equity, and does not operate to any extent as an assignment or transfer of the debt to the garnishor: *Chatterton v. Watney*, 17 Ch. D. 259; *In re Combined Weighing and Advertising Machine Co.*, 43 Ch. D. 99." See also Wade on Attachment, vol. 2, s. 325. The claim of the creditor to have his debt paid out of the money in the hands of the Canadian Bank of Commerce fails. These moneys must be paid into Court for the maintenance of the lunatic, without prejudice to such priority as this creditor may have obtained over any other creditors as to any surplus which may remain if the lunatic should die or recover before the fund is exhausted.

The creditor must pay the costs of the inspector and of the committee.

Boyd, C., Ferguson J., Meredith, J.]

[June 12.

HOLMES v. TOWN OF GODERICH.

Contract—Delivery of goods—Place—"At," meaning of.

The plaintiff, tendering for a supply of coal for the defendant's water-works, wrote, "I will deliver in bond into the coal shed at pumping station or grounds adjacent thereto where directed by you, one thousand tons," etc. The plaintiff's tender being accepted, a contract was drawn up by which he agreed "to deliver at the coal shed," etc.

The defendants refused to accept or pay for the greater part of the coal furnished by the plaintiff, because it was not delivered to them at the place mentioned in the contract, i.e., it was not put into the shed by the plaintiff, but left at the dock near the pumping station.

ARMOUR, C. J., who tried the action, found that all the coal was delivered "at the coal shed" within the true intent and meaning of

the contract, and held, that the word "at," as used in the contract, signified "near to," and that was the primary idea conveyed by this word, citing Webster's Dictionary, tit. "at;" *Mohawk Co. v. Utica and Schenectady Co.*, 6 Paige 554; *Dunkham v. Smith*, 5 T. B. Monroe 372; *State v. Cox*, 9 Vroom 302; *Homer v. Homer*, 8 Ch. D. 758; *Price v. Bala Co.*, 50 L. T. N. S. 787.

Held, by a Divisional Court, upon the evidence, reversing the finding of ARMOUR, C. J., that the portion of the coal in question was not delivered at the place designated by the contract.

Per BOYD, C.—"At" means rather within a place than without; "at" the coal shed means "in" or "in close proximity to" the shed. The cases referred to as to the meaning of the word "at" merely show its meaning under the circumstances of each case. Such words take their colouring from their circumstances and situation.

E. L. Dickinson, for plaintiff. *Garrow, Q.C.*, for defendants.

Rose, J.]

PRITCHARD v. PATTISON.

[June 14.

Evidence—Motion—Security for costs—Nominal plaintiff—Insolvency.

The plaintiff, being examined by the defendant as a witness upon a motion made by the defendant to set aside the proceedings and dismiss the action or for security for costs, on the ground that the plaintiff had no interest in the company on behalf of whose shareholders as well as himself he was suing, was asked what means he had of satisfying the costs in the action.

Held, that the defendant could not interrogate the plaintiff as to his financial position until, at least, a *prima facie* case had been made out that he was only the nominal, and not the real and substantial, plaintiff; and the evidence given upon the motion before the examination of the plaintiff showed that he had a substantial interest.

F. J. Roche, for plaintiff. *P. H. Drayton*, for defendant.

Boyd, C., Ferguson, J., Robertson, J.]

[June 19.

BEAM v. BEATTY.

Arrest—Application for discharge—Onus—Intent to defraud—Former absconding.

Upon an application by the defendant for his discharge from arrest under a *ca. re.*, he did not dispute the existence of a debt alleged by the plaintiff, nor that he was about to leave the country without paying or providing for it, but contended that he was not about to quit the province with intent to defraud. The debt sued for was contracted in 1893, and arose out of an irrigation scheme, in which the plaintiff was induced by the defendant to purchase an interest. It was alleged, but disputed, that this

was a fraudulent scheme. It was also alleged and denied that the defendant in 1893 absconded from this province to the United States of America. The defendant was a citizen of the United States, and was in Ontario in 1893, and again in 1900, when arrested, for temporary business purposes. It was not shown that he ever had any property in this province, nor that he took any away with him in 1893, nor that at the time of his arrest he had any in his hands or under his control. The evidence did not show that he was at the time of the arrest about to leave the province hurriedly, but that he intended to stay until he had finished the business which brought him to the province, and then return to his own country as of course.

Held, FERGUSON, J. dissenting, that the Court could not, upon this application, try the question whether defendant did or did not abscond in 1893; that the onus was upon the plaintiff to make out the fraudulent intent in the departure now proposed, by more than mere suspicion; and that, upon all the facts and merits disclosed the arrest could not be maintained.

Kersterman v. McLennan, 10 P.R. 122, distinguished.

Per FERGUSON, J.—Upon this application the burden was upon the applicant of showing that, upon the facts as they actually existed, the arrest should not have been ordered or made. Before, and at the time of his arrest, the defendant was not in a like position as to residence as was the defendant in *Clement v. Kerby*, 7 P.R. 103, or at all in the position of a mere traveller or visitor found in this country, but was living here and transacting important business here. His former conduct in respect of the same debt was also to be considered on the question of intent to defraud; and, having regard to that and all the facts appearing, the defendant was about to leave this country with intent never to pay this debt, or presumably any of the debts that he owed in this country, which was the same as an intent to defraud.

A. C. McMaster, for plaintiff. *Masten*, for defendant.

Province of Manitoba.

QUEEN'S BENCH.

Bain, J.]

THE QUEEN *v.* FOWCETT.

[May, 1900.]

Real Property Act—60 & 61 Vict. (D.), c. 29, s. 18—Dominion lands—Charge on land for indebtedness to Crown on seed grain mortgage of other land—Costs against the Crown.

The caveatee applied for a certificate of title for the N.E. quarter 10-11-8 W., under the Real Property Act, and the Minister of the Interior filed a caveat to establish his claim that the Crown was entitled to a lien or charge

thereon for the amount of the debt owing by the caveatee on a seed grain mortgage given by him in 1876 on the N.W. quarter of the same section, basing the claim on the provisions of sec. 18 of 60 & 61 Vict. (D.), c. 29, which is as follows: "In any case in which any settler or purchaser is entitled to the issue of letters-patent for any land to which the said Act (the Dominion Lands Act) relates, but the issue of such patent is delayed because of the liability of such settler or purchaser . . . as mortgagor on a mortgage in favour of the Crown for the repayment of an advance of seed grain, . . . the Minister may cause such letters-patent to issue, . . . and may transmit them to the registrar in whose district the land is situated, with a certificate signed by him or his deputy, . . . setting forth the particulars of such liability or indebtedness . . . the names of the persons liable or indebted therefor, and the land to be charged thereby, and the registrar, when registering the patent for such land, shall make the necessary entries respecting such indebtedness in the proper register or other record book in his office, and thereafter the said indebtedness shall be and remain a charge upon the land until satisfied and extinguished according to law." The provisions of this section were fully complied with except that the registrar failed, through an oversight, to make any entries respecting the indebtedness in the "Abstract Book," or other official record book in his office, but only in a docket or note book in which he kept a record of all applications under the Real Property Act received and examined by him, and which was only a book that he kept for his own convenience as Examiner of Titles, but not one required to be kept under either system of registration.

Held, that the indebtedness had not been constituted a charge upon the land in question, and that the petition of the caveator must be dismissed: Maxwell on Statutes, p. 453.

Held, also, that under Rule 277 of the Queen's Bench Act, 1895, the caveatee was entitled to his costs to be set off pro tant against his indebtedness to the Crown.

Howell, Q.C., and *Mathers*, for the Crown. *Aikins*, Q.C., and *Pitblado*, for the caveatee.

Full Court]. LAKE OF THE WOODS MILLING CO. v. COLLIN. [June 2.

Garnishment—Claim under fire insurance policy before proofs of loss furnished—Option to replace destroyed property—Queen's Bench Act, 1895, Rule 741 as amended by 60 Vict. (M.) c. 4 and Rule 742.

Application by defendant to set aside a garnishing order made in Chambers.

Rules 741 and 742 of the Queen's Bench Act, 1895, as amended by 60 Vict., c. 4, authorized the attachment by garnishing order of "all debts, obligations and liabilities owing, payable, or accruing due," not including such as do not arise out of any trust or contract, unless judgment has been

recovered thereon, but including all claims and demands which could be made available under equitable execution.

Held, that the claim of the assured under a policy of insurance against loss by fire, which provided that the loss should not be payable until thirty days after the completion of the proofs of loss usually required, could not be attached by garnishing order before such completion, although the property insured had been burnt.

Howell v. Metropolitan District Ry. Co., 19 Ch.D. 508, and *Central Bank v. Ellis*, 20 A.R. 364, followed. *Canada Cotton Co. v. Parmalee*, 13 P.R. 26, not followed.

The only kind of liability which may be attached under our statutes is a purely pecuniary one, and it must be absolute and not dependent upon a condition which may or may not be fulfilled.

Held, also, that the liability of the insurance company was not attachable because the policy contained a condition giving an option to the company to replace the destroyed property instead of paying the insurance money, if they should so decide within a certain time, which had not expired; so that it was not certain that any pecuniary liability would ever arise. Attaching order set aside.

Ewart, Q.C., and *Wilson*, for plaintiffs. *Howell*, Q.C., and *Mathers*, for defendant.

Full Court.] IN RE ST. BONIFACE ELECTION. [June 2.

Election petition—Preliminary objections—Proof of deposit of security—Evidence that notes deposited were current money of Canada—Notice of presentation of petition—Manitoba Controverted Elections Act, R.S.M. c. 29, s. 22.

Decision of BAIN, J., noted ante p. 245, affirmed with costs.

Andrews and *Bernier*, for petitioner. *Wilson*, for respondent.

Full Court.] IN RE ROSENFELDT ELECTION. [June 2.

Election petition—Preliminary objections—Manitoba Controverted Elections Act, R.S.M. c. 29, s. 18—Manitoba Election Act, R.S.M. c. 49, s. 196—Return to clerk of executive council and gazetting same before result of recount—Time for filing petition.

The Returning Officer having made his return to the Clerk of the Executive Council pursuant to section 196 of The Manitoba Election Act, R.S.M. c. 49, but without waiting for the result of a recount of which he had received notice, the Clerk, as required by s. 200, published the election of the respondent in the next number of the Manitoba Gazette. The petition was filed on the last of the thirty days thereafter in accordance with section 18 of the Controverted Elections Act, R.S.M. c. 29. After the result of the recount was made known confirming the election of the

respondent, the Returning Officer sent another return to the Clerk of the Executive Council which he duly gazetted, but this was more than six weeks after the filing of the petition. It was contended on behalf of the respondent that the first return and gazetting of the election were void, and that the petition not having been filed after the second return must be dismissed.

Held, that the petitioner could not have done otherwise than file his petition at the time he did. The respondent was then relying on the return that had been made and on the certificate of the Clerk of the Council issued to him in pursuance of it as entitling him to his seat in the Legislative Assembly, and should be estopped from now claiming that the return and publication thereof were nullities and that the petitioner was not entitled to file his petition at the time he did. To hold otherwise might cause serious public inconvenience; and in this particular case the effect would be that by the neglect or default of the Returning Officer the petitioner would be deprived of his right to complain of the election. Preliminary objections overruled with costs.

Ewart, Q.C., and *Wilson*, for petitioner. *Aikins*, Q.C., and *Crawford*, Q.C., for respondent.

Province of British Columbia.

SUPREME COURT.

Martin, J.] TATE v. HENNESSEY. [March. 14.
*Practice—Ex juris writ—Affidavit leading to order for—Jurisdiction of
Local Judge—Order XI—Rule 1075.*

Motion to set aside an order made by Spinks, Lo. J.S.C., allowing plaintiffs to issue a writ for service out of the jurisdiction. The action was for a declaration that defendants held certain interests in mineral claims in trust for plaintiffs. The cause of action was fraudulent misrepresentation.

Held, a Local Judge of the Supreme Court has jurisdiction to make an order for an ex juris writ.

The affidavit leading to the writ should be reasonably precise as to the essential facts alleged to constitute the cause of action, and if there are omissions of substance the order should not be made.

A Supreme Court Judge has power on motion to set aside an ultra vires order made by a Judge of limited jurisdiction.

Order set aside.

Duff, for the motion. *J. K. Macrae*, for plaintiffs.

Drake, J.] CRANSTON v. ENGLISH CANADIAN CO. [May 24.
Mining law—Unoccupied ground—Overlapping—Abandonment—Proof of.

Adverse claim tried before DRAKE, J., at Rossland, 23rd May, 1900.

Held, in adverse proceedings the party locating over a claim alleged to have been abandoned must produce clear evidence of abandonment, and it is not enough for this purpose to rely upon the non-production of certificates of work.

Semble, a locator cannot after abandonment by a prior locator rest on a location made before such abandonment, but must re-locate.

W. J. Whiteside, for plaintiffs. *J. A. Macdonald*, for defendants.

Drake, J.]

REGINA v. NICOL.

[June 20.

Venue—Change of—Grounds for—Criminal libel—Political bias.

Motion for change of venue from the County of Victoria. The defendant was charged with criminal libel in respect of an article in the Province newspaper published in Victoria on 11th December, 1897, and reflecting on the conduct of Messrs. Turner and Pooley, then members of the Provincial Executive. The motion was made under section 651 of the Criminal Code, 1892. The cause had been tried at Victoria in February, 1899, and in April, 1900, and in each of the trials the jury failed to agree. The affidavit of W. H. Langley, solicitor for the defendant, used in support of the motion set out that the prosecutors were, at the time of the alleged libel, and still are, interested in politics, and that in his belief it would be impossible to obtain a fair and impartial trial in the City or County of Victoria.

Held, in criminal libel, in order to obtain a change of venue, it is not sufficient to allege that the prosecution is interested in politics in the place where the libel is alleged to have been committed and that, therefore, the defendant cannot obtain a fair trial. The fact that two abortive trials have taken place is not per se a reason for change of venue.

Langley, for the motion *Cassidy*, contra.

North-West Territories.

SUPREME COURT.

Rouleau, J.]

THE QUEEN v. WHIFFIN.

[May 14.

Summary conviction under Liquor License ordinance, N.W.T.—Two offences charged in one information—Ss. 102 and 106—Both offences tried together—Minute of adjudication—Hand labour—Costs.

This was an application to quash a conviction against one Alfred E. Whiffin who was convicted on the 5th July, 1899, of having unlawfully sold intoxicating liquor without a license, and of having kept intoxicating liquor

for the purpose of sale without a license, on the following grounds : 1. That the conviction was bad in law inasmuch as it was for two offences ; 2. That the said conviction was bad in law inasmuch as it imposed hard labour in default of payment of the fine imposed or of sufficient distress ; 3. That the conviction was bad in law inasmuch as it varies from the minute of adjudication ; 4. That the minute of adjudication did not disclose the commission of any offence in law.

The minute of adjudication was in these words : "It is this day adjudged by the Court that the accused Alfred E. Whiffin be convicted of the charge of selling intoxicating liquor and of keeping the same for sale, and that the accused Alfred E. Whiffin be fined the sum of fifty dollars for each offence and the costs of the Court five dollars and thirty-five cents, and in default of payment to two months' hard labour in the guard room at Maple Creek, N.W.M. Police."

The original conviction provided for distress and sale of defendant's goods, and in default of sufficient distress two months' imprisonment at hard labour. In the amended conviction the distress clause and hard labour were omitted. The other facts sufficiently appear in the judgment.

James Muir, Q.C., for the Attorney General. *R. B. Bennett*, for the defendant.

ROULEAU, J.—Under s. 102 of c. 89 of the Consolidated Ordinances several charges of contravention of this Ordinance may be included in one and the same information or complaint, and under s. 106 convictions for several offences may be made although committed on the same day. The amended conviction returned into Court adjudged "the said Alfred E. Whiffin for each of his said offences to forfeit and pay the sum of fifty dollars," which the J.P. was authorized to do under said s. 106. Unless the statute would prohibit such conviction, I do not think that a Court of Justice would quash it on that ground: *King v. Swallow*, 8 Term Rep. 284.

The second ground of objection has been remedied by the amended conviction.

The third ground of objection is that the conviction is bad in law because it varies from the minute of adjudication inasmuch as the minute of adjudication imposed imprisonment at hard labour, which is not authorized by the Ordinance, and the amended conviction imposes only imprisonment.

I am of the opinion that in view of Art. 889 of the Crim. Code and the late decisions given in cases similar to this the judge would have power to amend a conviction if it followed the adjudication in which the magistrate would impose imprisonment at hard labour when he was only authorized to award imprisonment without hard labour. At all events, according to numerous decisions, the magistrate has certainly the right to omit such an error in his formal conviction. This is what he did in this case. Amongst other cases, I may cite the following cases which are very much in point :

Reg. v. Hartley, 20 Ont. R., 481; *Reg. v. Richardson*, 20 Ont. R., 514; *Reg. v. McCay*, 23 Ont. R., 442.

If any other grounds of objection could have been sustained I think the fourth ground might have been argued with success, but I am of the opinion that this ground is not tenable now in view of s. 889 of the Criminal Code which says that "No conviction or order made by any Justice of the Peace shall, on being removed by certiorari be held invalid for any irregularity, informality or insufficiency therein, provided the Court or Judge before which or whom the question is raised is, upon perusal of the depositions, satisfied that an offence of the nature described in the conviction, order or warrant, has been committed, over which such justice has jurisdiction," etc., etc. This no doubt gives me the right to adjudicate de novo on the evidence given before the magistrate. But I may add that I am of the same opinion as that expressed in *Ex p. Nugent*, 1 Can. Crim. Cases, 126, that the Court should not amend a conviction if in so doing it has to exercise the discretion of the magistrate; also that where the only penalty authorized has been imposed, but with an unauthorized addition the latter may be struck out on amendment after its return under certiorari.

For these reasons this application is refused without costs. Amended conviction affirmed.

My reason for not granting costs is that costs of certiorari proceedings are not usually given where the conviction is amended and affirmed in the amended form: *R. v. Higham*, 7 El. & Bl., 557.

WHERE TO SPEND VACATION DAYS.

The average member of the legal profession, wearied with the ceaseless grind of office work, needs absolute change of surroundings and climate for the full enjoyment of his vacation. These can be found in a cruise on the great Upper Lakes, in the incomparable mountains of British Columbia, in the picturesque region of the Temiskaming or in the wild Laurentians, north of Montreal, and on the Atlantic coast. If the invigorating salt laden breezes of the ocean are sought, there is no more delightful spot where they can be enjoyed than St. Andrews-by-the-Sea in New Brunswick—a charming retreat on Passamaquoddy Bay, which offers those attractions to recreation and health seekers that are possessed by few other places. There is a wealth of scenic beauty about St. Andrews-by-the-Sea, a perfect summer climate that is cool and temperate, excellent sea bathing, capital fishing, and roads in the locality unsurpassed in their smoothness and freedom from dust or mud, leading in many directions to interesting places. The water trips are also numerous, and on the placid Bay, sheltered from the Atlantic's storms and fogs by a long barrier of islands, and up the St. Croix river, boating may be indulged in even by the inexperienced in perfect safety, for here there are no sudden squalls nor heavy seas. Deep sea

fishing for cod, haddock and pollock is within a few miles of the town, and in the near-by Chamcock Lakes are land-locked salmon, and the numerous brooks and streams of the locality are filled with trout. There are clambakes and dulse parties at St. Andrews-by-the-Sea, and the operation of seining sardines after the fish are impounded in the weirs is an interesting operation to the stranger. Golf is a favorite amusement, and the Algonquin Club, with a membership of 125, distributed over Canada and the United States, has an unequalled, natural nine hole golf links.

One of the great charms of St. Andrews-by-the-Sea is in the restfulness of the surroundings. The town boasts of an excellent modern summer hotel and several smaller ones, and there are numerous boarding houses for those with limited purses. Cottages, both furnished and unfurnished, are also procurable.

St. Andrews-by-the-Sea is reached by the Canadian Pacific Railway, which runs through sleepers from Montreal every Tuesday and Friday nights during the summer, and very low fares are in effect for this delightful outing.

On the Upper Lakes, what is practically an ocean voyage may be enjoyed by taking one of the C.P.R.'s. magnificent lake steamers from Owen Sound, and crossing Lake Huron, running up the Sault Ste. Marie river and through the locks to Lake Superior and across that greatest of all bodies of fresh water to Port Arthur and Fort William. There are three sailings a week from Owen Sound and the round trip can be made in less than a week.

Beyond the Great Lakes, lie the gold fields of New Ontario, to reach which is involved a pleasant trip on Lake of the Woods, and further west are the great prairies and ranching grounds of Western Canada, and beyond again are the mountain regions of British Columbia, in which the Canadian Pacific has materially aided Nature in creating delightful resorts—at Banff, in the Canadian National Park, the famed Lakes in the Clouds, Field at the base of Mount Stephen, the Great Glacier, the largest of all Ice-fields, Revelstoke, on the Columbia, Sicamons, at the galency to the Okanagan Valley, and at North Bend, in the wonderful canons of the Fraser. Vancouver and Victoria will present to the eastern traveller an idea of the growth and progress of Canadian cities on the Pacific Coast, and in returning home, the gold fields of the Kootenay and boundary countries can be visited and the great plains of the North-West revealed again by the Crow's Nest Pass Railway—thus affording views of the mountain region from different degrees of latitude.

Correspondence.

To the Editor CANADA LAW JOURNAL :

I enclose a clipping from a country paper which, after giving name and address, reads as follows : " Member of Law Society of Ontario, will execute Mortgages, Deeds, Wills, Leases, etc. Moderate charges. Satisfaction guaranteed. Office and Residence —." There are two features which are somewhat new in the advertisement ; one is that the advertiser is " a member of the Law Society of Ontario." Possibly this may be somewhat different from the " Law Society of Upper Canada," but the names are sufficiently alike to provoke enquiry. Then again, most of the advertisements I have seen of this kind stated that the advertiser was prepared to *draw* documents of all kinds, for moderate charges, and to guarantee satisfaction. This gentleman goes a little further and says that he is prepared to "execute" them on the same reasonable terms.

Yours,

READER.

Book Reviews.

Law and Practice in Accident Cases, by CHAS. C. BLACK, author of *New Jersey Law of Taxation*. Newark, N.J.: Soney & Sage. 1900.

This is an enlargement of a previous book known as *Proofs and Pleadings in Accident Cases*. The writer states his object to be to produce a practice book in distinction from standard works on the law of negligence, a book that would render assistance in bringing, maintaining, and defending accident cases in the Courts, and which would be useful for ready reference at the trial. It includes a statement of general principles, with short treatises on actions and parties thereto ; pleadings and forms ; evidence and proof ; damages for personal injuries and for causing death ; questions of law and fact ; contributory negligence ; fellow servants, etc. In these days when accident cases form so large a portion of litigation in all our Courts, every assistance that can be had will be welcomed by the profession, and the volume before us, which contains over 700 pages, will be helpful in this country, though a comparatively large portion is devoted to forms of pleadings and practice inappropriate to our procedure.

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NOS. 15 AND 16.

The rumour as to the judicial appointments referred to in our last issue has proved correct. The *Canada Gazette* of July 7th, announced the appointment of Chief Justice Armour to the vacancy caused by the resignation of Sir George Burton, chief justice of the Court of Appeal, and of Mr. Justice Falconbridge to the chief justiceship of the Queen's Bench Division.

An Act to amend the Acts respecting interest passed at the last session of the Dominion Parliament marks an epoch in the financial world, in that it makes five per cent. per annum the legal rate of interest (as it is popularly called) instead of six per cent. If the accumulation of capital increases as it has done during the last quarter of a century, the rate will soon be down to four per cent.

The impropriety of placing undue weight upon expert evidence as to handwriting has been emphasized by a recent occurrence in the United States. A man was convicted of sending objectionable matter through the mails mainly upon the evidence of two experts in handwriting, but it was claimed that he was not the guilty person, inasmuch as after his imprisonment the objectionable matter continued to pass through the post office in apparently the same handwriting. Shortly after, the police arrested another man, who was also convicted on the same expert testimony. It was doubtless right that the first man should be pardoned, and possibly the second may also claim the same indulgence by and by; but however that may be, or whether the continuance of the crime was a put-up job by some clever friend of the first man so as to free him, it is clear that expert evidence of that sort has received a severe and well-deserved shock.

A correspondent calls attention to a matter which we submit as a suggestion to the reporters of the various courts of the Province. Our correspondent thinks it would be a valuable aid to a rapid perusal of the cases if the final judgments of the courts were more clearly pointed out and dissenting judgments unequivocally indicated. Every practitioner, he says, remembers the vexation of wading carefully through the arguments and conclusions of some learned judge only to find that they did not commend themselves to the majority of the court. It would entail no extra labour on the editors of the reports and would be most useful to the profession if the judgment of the court were indicated by the word "judgment" repeated in the margin of every page, and dissenting opinions by the word "dissenting" in the same manner. This was the practice in many of the older English reports, and it is suggested that it might be done with advantage to-day.

An ecclesiastical court in the Province of Quebec has recently pronounced a marriage of a Roman Catholic with a Protestant, performed by a Unitarian minister, to be no marriage according to ecclesiastical law, although it is certainly a valid marriage according to the law of the land: see *Code Civile*, s. 129. It is a pity that ecclesiastical and secular law should come in conflict, and that the one should pronounce that to be unlawful which the other declares to be lawful. Where, however, this conflict arises, the ecclesiastical sentence can have no weight except in *foro conscientiae*, and although the ecclesiastical court may say the parties are not married, yet the rights, duties and obligations of the contract and the penalties for evading it which the law declares to have been lawfully made, will attach to the parties to the contract no matter what the ecclesiastical court may say. The parties may refuse marital intercourse, and no secular court, of course, can compel it, but the secular court may visit either party with any legal penalties which they may incur by the violation of the contract. If either party marry in the lifetime of the other, without a divorce a vinculo having been first obtained, he or she would be guilty of bigamy and liable to the consequences. If the husband refused to support his wife, he might be visited with the punishment attaching to that offence, and he would be liable for necessities supplied to her. It is said that a judge of a civil court, before whom an action by the wife against her husband for maintenance came on to be

heard, refused to entertain the case until the status of the parties had been determined by an ecclesiastical tribunal. We should suppose there must be some mistake about this, and that no judge of a civil court would thus abdicate his functions, but if any civil judge so far misunderstood his duty, we are disposed to think that he ought to be called very sharply to account by the Minister of Justice.

THE COMMONWEALTH OF AUSTRALIA.

The union in Federal form of the Australian Provinces is a great political fact, making a step forward towards that larger Imperial union which is now foremost in the minds of people of British blood in all parts of the Empire. It is, however, with the constitutional features of the scheme, rather than with its political importance, that it is our province to deal.

The Australian Federation, embracing so far the colonies New South Wales, Victoria, Queensland, South Australia, and Tasmania, with power for the admission of West Australia and New Zealand, is based partly on the American, and partly on the Canadian system. It differs from the former in adhering to the principle of responsible government as understood in Great Britain and Canada. It differs from the latter in adopting the American plan of giving to the federated states, or provinces, all the powers not specially conferred upon the central authority. This difference in the distribution of powers between the central and provincial authorities is one of great importance. The tendency in the one case towards centralization, and in the other towards disintegration, has been frequently exemplified in the history of Canada, and of the United States. Conflicts in both countries have arisen; in the former from encroachments by the central governments upon the powers delegated to the Province; in the latter from attempts on the part of the States to claim authority in matters especially defined as within the jurisdiction of the Federal Government. In neither case is it possible so exactly to define the limits of the several powers that debatable questions, and doubtful points, will not arise. Happily for us we have been able to settle such disputes by referring them to the arbitration of the Supreme Court, and, in the last resort, to the judgment of the Privy Council. The power of appeal from the Supreme Court to the Imperial Privy Council upon questions arising

between the Federal and Provincial Governments, so important a feature of the Canadian Constitution, has, however, not been adopted by the framers of the Australian Commonwealth Bill. As finally adopted, and presented to the Imperial Parliament, the Bill contained a clause expressly declaring that no appeals should in future be carried to the Privy Council from the High Court of the Australian Commonwealth upon questions involving the interpretation of the Federal constitution, or of the constitutions of the several states, except in cases "where the public interests of some part of Her Majesty's dominions other than the commonwealth or a state are involved." To this clause of the Bill exception was taken by the Imperial authorities, and it was stricken out of the Act as introduced into the Imperial Parliament by Mr. Chamberlain. The grounds of the objection may be briefly stated as follows: The vagueness and uncertainty of the term "public interests"; the impairing of an important link in the unity of the Empire; the desirability of having grave questions arising between States settled by the highest tribunal in the Empire beyond suspicion of local bias or predilection; questions as to the operation of Commonwealth laws on British shipping, etc., which could not be finally left to the Australian court; that British subjects in other parts of the Empire whose interests might be affected by commonwealth legislation could not be deprived of the right of appeal to the Privy Council; and later the strong feeling expressed by banks and commercial institutions having interests in Australia in favour of maintaining the right of the appeal. Mr. Chamberlain concludes his list of objections in these words:—"Her Majesty's Government feel that the actual restriction and the power claimed to make further restriction, equivalent to a practical abolition of the appeal, are specially inopportune at a moment when they are considering the terms of the Bill, enhancing the dignity and promoting the efficiency of the Judicial Committee of the Privy Council by its practical amalgamation with the House of Lords, and providing for the adoption of permanent representation of the great colonies in the new court about to be created. The practical withdrawal of Australian appeals would deprive the new court of a large part of its value as providing new spheres of co-operation between the colonies and the mother country, and to some extent giving effect to the ardent desire for closer relations that now happily exist in the mother country and the colonies."

It is worthy of note that there is evidence of a strong feeling

among many of the leading men of Australia, especially among the mercantile classes, and among the members of the Bar, in opposition to the restriction of the power of appeal.

A long controversy on this subject ensued between Mr. Chamberlain and the Australian delegates, and the matter was at last settled by the adoption, by way of compromise, of the following clause in place of that which had been struck out from the Bill :—
“No question howsoever arising as to the limits inter se of the constitutional powers of the commonwealth and those of any state or states, or as to the limits inter se of the constitutional powers of any two or more states, shall be capable of final decision except by the High Court, and no appeal shall be permitted to the Queen in Council from any decision of the High Court on any such question, unless by the consent of the Executive Government or Governments concerned, to be signified in writing by the Governor-General in the case of the commonwealth and by the Governor in the case of any state. Except as provided in this section, this constitution shall not impair any right which the Queen may be pleased to exercise by virtue of her Royal Prerogative to grant special leave of appeal to her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, provided that any proposed laws containing any such limitation shall be reserved by the Governor-General for her Majesty's pleasure.”

The clause as originally framed was as follows :—“No appeal shall be permitted to the Queen in Council in any matter involving the interpretation of this constitution or of the constitution of a state unless the public interests of some part of her Majesty's dominions other than the commonwealth or a state are involved. Except as provided in this section this constitution shall not impair any right which the Queen may be pleased to exercise, by virtue of her Royal Prerogative, to grant special leave of appeal from the High Court to her Majesty in Council. But the Parliament may make laws limiting the matters in which such leave may be asked.”

It will be noticed that besides putting in more definite terms the limitations on the right to appeal, the new clause permits an appeal by consent of the governments concerned. It also provides that the power given to the Commonwealth Parliament of limiting the matters in regard to which the Queen may be pleased to grant

special leave of appeal shall be exercised subject to reservation for her Majesty's pleasure. These differences are important, and well worth the time spent in the discussion which brought them about. Experience will probably teach the Australians the value of such a final court of appeal as the Imperial Privy Council, especially when it has been reinforced and reorganized in the manner proposed by Mr. Chamberlain.

In this question of the appeal to the Privy Council, in the choice of the names of Commonwealth and States in preference to those of Dominion and Provinces, in the distribution of powers between the central and local authorities, and in the election of the members of the second chamber of the Legislature, the framers of the Australian Act of Confederation have followed the American in preference to the Canadian model, with the result of arriving much more nearly at a position of independence than was contemplated, or achieved, by the fathers of the confederation of the Provinces of British North America.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act.)

VENDOR AND PURCHASER—COVENANT FOR TITLE—WRITTEN CONTACT—MISTAKE—RECTIFICATION—PAROL EVIDENCE TO VARY WRITTEN CONTRACT.

In *May v. Platt* (1900) 1 Ch. 616 the plaintiff sued for damages for breach of an implied covenant for title. The defendant under what is hereafter called the principal agreement, was entitled inter alia to a lease of a parcel of land coloured red on a plan annexed to the agreement, this interest he contracted to sell to the plaintiff, and in pursuance of such contract conveyed to the plaintiff "all his estate term and interest, under and by virtue of the principal agreement in the piece of land coloured red in the plan annexed to the principal agreement." Prior to the deed it appeared that the plaintiff had in fact released a part of the land coloured red, called plot A, as to which consequently he was unable to make title. The action was brought to recover damages occasioned by the deficiency. The defendant tendered evidence to show that before the contract of sale was made the plaintiff's agent was shown an amended plan, and that the agent intimated that the difference in

the amount of land occasioned by the abstraction of plot A was immaterial for the purposes for which the land was required by the plaintiff, and the defendant alleged that plot A had been included in the conveyance by mistake and contrary to the true intention of the parties, and on the ground of these allegations, which were denied by the plaintiff, he claimed a rectification of the deed. Farwell, J., held that, as the written contract and conveyance were clear and unambiguous, the proposed evidence and parol agreement to vary the deed, in the absence of any fraud, was inadmissible: that the covenant was binding on the defendant and extended in regard to title to all the estate which the defendant acquired under the principal agreement, and the words "if any" could not be implied; and in regard to the quantity of land, to the whole of the parcel coloured red in the plan annexed to that agreement. Judgment was consequently awarded in favour of the plaintiff and the counterclaim of the defendant was dismissed. The learned judge expressed the opinion that the cases of *Harris v. Peperell*, L. R. 5 Eq. 1; *Garrard v. Frankel*, 30 Beav. 445; and *Page v. Marshall*, 28 Ch. D. 555; where relief was granted on the ground of a unilateral mistake, can only be supported on the supposition of there having been also fraud on the part of the defendants, although the judges appear to have shrunk from actually stigmatizing the conduct of the defendants in those cases as fraudulent; and in the absence of fraud he holds that the court has no jurisdiction to put vendors or purchasers of land to their election to rescind or accept rectification, on the ground of a unilateral mistake.

WASTE—LANDLORD AND TENANT—ALTERATION OF NATURE OF DEMISED PREMISES.

In *West Ham Charity Board v. East London Waterworks Co.* (1900) 1 Ch. 624, 12 acres of meadow land were leased for 99 years to the defendant waterworks company for the purpose of constructing a reservoir, but the company did not construct the reservoir, but used the land for grazing purposes down to 1896 when they sublet for a part of the residue of the term to the defendant Base for the purpose of being used as a rubbish shoot. Base took possession and shot quantities of rubbish on the premises thereby raising its surface about ten feet. The plaintiffs claimed that this user of the land amounted to waste, and claimed an injunction restraining the further deposit of rubbish on the demised premises, and damages. The only value of the land at the end of

the term would be for building factories, to obtain a proper foundation for which it would be necessary to dig down to the original level of the land. Buckley, J., held that there had been such an alteration of the thing demised—irrespective of the question whether the added material was offensive or not—as to constitute waste; and that it was no answer to the plaintiffs' claim that the increased expense of digging to obtain a proper foundation would be more than compensated by the increased rent which would be obtainable by the reversioner for the land in its heightened condition, and that both the waterworks company and Base were liable for the past acts of waste and both should be restrained by injunction from committing waste in the future, and he gave judgment accordingly, and directed an inquiry as to damages.

LANDLORD AND TENANT—COVENANT FOR QUIET ENJOYMENT—ERECTION OF BUILDINGS BY LESSOR ON ADJOINING LAND CAUSING LESSEE'S CHIMNEYS TO SMOKE.

In *Tebb v. Cave* (1900) 1 Ch. 642, Buckley, J., decides a single point, viz., that where a lessor builds on land adjoining the demised premises so as to cause his lessee's chimneys to smoke, that constitutes a breach of his covenant with his tenant for quiet enjoyment, for which the tenant is entitled to damages.

CHARTER-PARTY—DEMURRAGE—DELAY AT LOADING POINT.

Tyne & Blythe Shipping Co. v. Leech (1900) 2 Q.B. 12, was an action for demurrage. A ship was chartered to go to a foreign port for a cargo, the charterers guaranteeing a cargo and quay berth ready at the port on the arrival of the ship at the foreign port, owing to the charterers being unable to provide a quay berth the ship went on demurrage, and while lying at anchor waiting for a quay berth was run into by another ship and disabled; it was then taken by the captain to another port for repair, and during her absence for that purpose a quay berth fell vacant which would have been given to her had she been there. After her return to the port of shipment she was kept waiting a further six weeks for a quay berth. The shipowners claimed demurrage for this six weeks, but not for the period the ship was absent for repair. The defendant contended that they were not liable because the terms of the charter party exempted the charterers from liability for delays in the loading from causes beyond the control of the

charterers, and they claimed the loss of the quay berth for the six weeks was due to the collision over which they had no control, but Kennedy J. was of opinion that the case did not come within the exception, that the vessel being absent for repairs without any default of the owners, when she returned, the demurrage obligation was immediately again in force without any break in its continuity.

PRINCIPAL AND AGENT — BROKER LUMPING SEVERAL ORDERS IN ONE CONTRACT—LIABILITY OF PRINCIPAL TO JOBBER ON DEFAULT OF BROKER.

Beckhouson v. Hamblet (1900) 2 Q.B. 18, involved a neat point in the law of principal and agent. A broker having orders from several different customers (including the defendant) to purchase shares for them on the stock exchange, purchased from the plaintiffs, who are stock jobbers, 360 shares, 210 of which the brokers apportioned to the defendant in respect of the shares he had ordered to be bought. Before the settling day the brokers failed, and were declared defaulters in accordance with the rules of the stock exchange, and their transaction with the plaintiffs was closed, and the price of the shares was fixed at the price then current. The plaintiffs having ascertained that the broker was acting for the defendant as regarded the 210 shares, tendered those shares to the defendant and demanded payment, and on his refusal, sold them on the settling day and brought the present action for the difference between the contract price and the selling price. The action failed, Kennedy J. holding that as the brokers had lumped the defendant's order with others, and had contracted in a single transaction for the purchase of a larger number of shares than he was authorized to purchase for the defendant, there was no contractual relation between the plaintiffs and defendant, which would support the action. In other words he held that the contract made by the broker was his contract and not a contract of either of his customers.

CONTEMPT OF COURT—SCURRILOUS ABUSE OF JUDGE AS A JUDGE.

The Queen v. Gray (1900) 2 Q.B. 36, was a summary proceeding instituted by the Attorney-General against the defendant for contempt of court in publishing in a newspaper an article containing scurrilous abuse of a judge, with reference to his conduct as a judge in a judicial proceeding which had terminated. The facts

were that Darling J. when presiding at the assizes at which a man named Wells was about to be tried before him for publishing indecent and obscene words, made some observations in court deprecating the publication in the newspapers of particulars of the case, and warning the public of the consequences of so doing, and stating that he hoped and believed his advice would be taken, but if it was disregarded he should make it his business to see that the law was enforced. On 16th March, after the trial of Wells, which had resulted in his conviction and after sentence passed, and whilst the assizes were still continuing and Darling J. was still sitting, the defendant published the article in question. Whereupon the Attorney-General obtained an order calling on the defendant to answer for his contempt. On the return of the order it was admitted that the article was a contempt of court, and the defendant filed an affidavit expressing his regret and apologizing to the court; he was, nevertheless, ordered by the court (Lord Russell, C.J., and Grantham, and Phillimore, JJ.) to pay a fine of £100 and £25 costs, and to be detained in custody until payment. The Reporter adds a note that the practice in such cases has recently been to obtain an order directing the accused to appear and answer for his contempt, referring to *Onslow and Whalley's Case* L.R. 9 Q.B. 219, and he adds "the procedure by writ of attachment seems to have been superseded."

PRACTICE—COSTS OF REFERENCE—REFERENCE OF ACTION TO ARBITRATION—SCALE OF COSTS.

In *Street v. Street* (1900) 2 Q.B. 57, the Court of Appeal (Collins and Romer L.JJ.) has given what Romer L.J. calls a "coup de grace" to *Moore v. Watson* (1867) L.R. 2 C.P. 314. The point of practice involved was simply this: The action was brought to recover £90, the alleged balance of a builder's account, and, on the application of the plaintiff, had been referred to an arbitrator agreed on by the parties. The costs of the action were ordered to abide the event, and the costs of the reference and award were in the discretion of the arbitrator. The arbitrator awarded the plaintiff £33 and ordered the defendant to pay the costs of the reference and award, but gave no direction as to the scale on which they should be taxed. *Moore v. Watson* had practically decided that, under such circumstances, the costs of the reference and award are in effect part of the costs of the action, and are taxable

on the same scale as the costs of the action. The correctness of that decision had been questioned in a late case, and it was also opposed to earlier decisions which were not referred to. The taxing officer taxed the costs of the reference on the High Court scale, and Bingham J. had confirmed his ruling. The Court of Appeal being of opinion that *Moore v. Watson* ought not to be followed, dismissed the appeal from Bingham J. Romer L.J. says that the arbitrator having simply awarded costs the proper inference is that he intended to award costs on the ordinary scale in High Court actions, namely, on the High Court scale, and not that he intended to award them on any special scale, such as the County Court scale.

BICYCLE—CARRIAGE—TOLL.

Cannan v. Abingdon (1900) 2 Q.B. 66, is a case which turns upon the question whether a bicycle is a "carriage" within the meaning of a Turnpike Act, and as such, liable to tolls. Bingham and Phillimore JJ. determine that question in the affirmative.

PARTY WALL—ADJOINING OWNERS—IMPLIED CONTRACT TO PAY HALF COST OF PARTY WALL.

Irving v. Turnbull (1900) 2 Q.B. 129, was an action brought by the plaintiff to restrain the defendants from using a certain wall as a party wall, or in the alternative to compel the defendants to pay half its value. The plaintiff had purchased the land on part of which the wall was built, as part of a building estate, subject to certain building conditions, one of which was, that the purchaser first building a party wall should be repaid half its current value by the purchaser of the adjoining site. The defendants purchased the adjoining site subject to the like conditions and made use of the wall built by the plaintiffs, predecessor in title, as a party wall. The defendants admitted that they were bound to pay some one for half the value of the wall, but denied any privity of contract with the plaintiff, or any liability to pay him. Darling and Channell JJ. were of the opinion that there was an implied contract on the part of the defendants to pay the plaintiff half the current value of the wall in question and affirmed the judgment of the County Court in his favour.

FRAUDULENT PREFERENCE—BANKRUPTCY—PAYMENT TO CREDITOR WITH VIEW TO PREFER SURETY.

In re Warren (1900) 2 Q.B. 138, the question determined is a simple one. A bankrupt was liable on a promissory note, jointly and severally with two other persons who were merely sureties; being insolvent, and with the view of relieving the sureties, she paid the note to the holder. The assignee in bankruptcy claimed that this payment was a fraudulent preference of the sureties, from whom he sought to recover the amount of such payment, but Wright and Phillimore JJ. held that to constitute a fraudulent preference under the Bankruptcy Act, 1883 (46 & 47 Vict., c. 52), s. 48, the payment must be made to the creditor intended to be preferred.

DISCOVERY—PRODUCTION OF DOCUMENTS—COMMUNICATIONS BETWEEN SOLICITOR AND CLIENT—PRIVILEGE—EVASION OF STATUTE.

The Queen v. Bullivant (1900) 2 Q.B. 163, deals with a point of practice. The action was in the nature of an information by a colonial Attorney-General to recover succession duty on certain property under a Colonial Act. The information claimed that certain conveyances had been made by the deceased for the purpose of evading the Act. On the examination of the defendant for discovery he admitted that he had in his possession, as solicitor for the deceased, certain books in which were entered instructions received from the testator in reference to the impeached conveyances which he objected to produce as being privileged. On application to Mathew J. he was ordered to produce the book in question, and the Court of Appeal (Collins and Romer, L. JJ.) sustained the order, holding that privilege cannot be claimed for communications between solicitor and client which came into existence for the purpose of the client obtaining professional advice as to how to evade the statute, the evasion of which is the ground of the action in which the discovery is sought.

LIBEL—PUBLICATION OF LIBEL—CIRCULATING LIBRARY—BOOK CIRCULATED IN IGNORANCE OF LIBEL THEREIN CONTAINED—NEGLIGENCE.

Vizetelly v. Mudie's Library (1900) 2 Q.B. 170, was an action of libel against the Mudie's Library Company for circulating a book containing a libel on the plaintiff. One of the two managing directors of the company was called as a witness for the defence

and denied any knowledge when the company circulated and sold the book in question that it contained any libel on the plaintiff, and he stated that the books which they circulated were so numerous that it was impossible, in the ordinary course of business, to have them all read, and they were guided in their selection of books by the reputation of the publishers and the demand for the books. He said there was no one else in the establishment besides himself, who exercised any supervision, and that they did not keep a reader; that on one or two occasions they had had books which contained libels, that that would occur from time to time; that no previous action for libel had been brought, and that it was cheaper to run the risk of an action than to keep a reader. On this evidence the jury found the defendants guilty and gave a verdict against them for £100 damages. On a motion by the defendants for judgment, or a new trial, the Court of Appeal (Smith, Williams and Romer, L.JJ.) held that the verdict was warranted by the evidence, and the application of the defendants was accordingly dismissed.

COSTS—PROBATE ACTION—SEVERANCE OF DEFENCES.

In *Bagshaw v. Pimm* (1900) P. 148, the action was brought in the Probate Division to establish the third, and alternatively the second, will of a testator; the defendants to the action were the executors of the first will and two legatees thereunder. The legatees were interested in upsetting both the second and third wills, but the executors were only substantially interested in upsetting the third. The legatees and executors appeared by separate counsel, and the first will was established. Barnes, J., who tried the action, on appeal from the taxing officer, considered that the defendants ought not to have severed and gave them only one set of costs, and such extra costs as were incurred by the legatees in getting up evidence material to the case. On appeal, however, the Court of Appeal (Lindley, M.R., and Rigby and Williams, L.JJ.) thought that as the executors might have preferred to compromise on the footing of the second will being established, there was such a divergence of interest between them and the legatees as to justifying the latter appearing by separate counsel, and that therefore they were entitled to full costs. The rule laid down by Boyd C. in *Logan v. Herring*, 19 P.R. 169, would seem to need modification.

Correspondence.

SUPREME COURT APPEALS.

To the Editor CANADA LAW JOURNAL.

Dear Sir,—In a late number of your journal I endeavoured to show concisely the opinions of the Judges of the Supreme Court in *Farquharson v. Imperial Oil Co.*, as to the power of the Court or a judge to grant leave to appeal per saltum from a judgment of a Divisional Court from which there is no appeal as of right to the Court of Appeal. At page 362 of the current volume of your journal, you advance the opinion that the statute 62 Vict., 2nd Sess., c. 11, s. 27 settles the question in favour of the right to grant such leave. As the question is important perhaps you will grant me the privilege of space enough in your journal to point out why I consider the position you take an untenable one.

The judges who held that no leave to appeal could be given in this case, did so on the ground that under s. 26 of the Supreme Court Act, such leave can only be granted where the parties have an absolute right to go to the Court of Appeal, but it is advisable to dispense with the exercise of such right and allow an appeal direct. That section provides that an appeal shall lie only from the Court of final resort for the Province, but the Court or a judge may grant leave for an appeal from the Court of original jurisdiction "without any immediate appeal being had to any intermediate Court of Appeal in the Province." Following the terms of the statute, in this case, then, the order was to grant leave to appeal from the judgment of the Divisional Court without an intermediate appeal being had to the Court of Appeal.

Judge Taschereau was of opinion that to grant leave in the *Farquharson* case would have the effect of striking out of the section the words above quoted. Then, assuming that he was not aware of the section referred to in your editorial, could its terms change his opinion? Admitting that an appeal will always lie to the Court of Appeal by leave, is s. 26 satisfied by dispensing with such potential right? If application for leave to appeal is made and refused by the Court of Appeal what is dispensed with by the order under s. 26? Surely nothing more than if the application could not have been made.

Judge Taschereau points out another objection to granting leave in such a case. By 60 & 61 Vict., c. 34 (Dom.), there is a limitation on appeals to the Supreme Court from judgments of the Court of Appeal, but the limitation would not extend to appeals from Divisional Court judgments. Then the power of granting leave to appeal to the Court of Appeal might work this way. If the leave were granted the case might not be appealable under 60 & 61 Vict., c. 34. If it were refused leave to appeal per saltum might be given in spite of the Dominion legislation.

An article in a late number of the *Canadian Law Times* on the Farquharson case states that four judges of the Supreme Court must be held to favour the right to grant leave to appeal per saltum. That is not so. The jurisdiction of the Court was settled by a ruling that the exercise of judicial discretion by Mr. Justice Gwynne in Chambers would not be interfered with, which is all that King and Girouard, JJ., can be held to assent to. If a case should come before the Court in the same way hereafter, there would be nothing in that ruling to prohibit a motion to quash for want of jurisdiction or to prevent either of these two judges giving effect to such motion.

For the same reason that the *Law Times* is in error your own editorial is wrong in assuming that the Court agreed with Gwynne, J., that in the Farquharson Case the Court of Appeal could not have granted the leave to appeal asked for. The grounds on which Judge Gwynne proceeded were not at all considered by the full court.

C. H. MASTERS.

Ottawa, July 6.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

B.C.]

HIBBEN *v.* COLLISTER.

[June 12.]

Partnership—Construction of deed—Continuance after expiry of term—Deceased partner—Purchase of share—Discount—Goodwill.

A deed providing for a partnership during seven years from its date provided for purchase by the survivors of the share of a deceased partner with a special provision that if one partner, K., should die, the value of his share should be subject to a discount of 20 per cent. After the seven years had expired the partners continued the business by verbal agreement for an indefinite period, and while it so continued K. died.

Held, varying the judgment of the Supreme Court of British Columbia, that even if the parties had not admitted that the business was continued under the terms of the partnership deed such terms would still govern as there was nothing in it repugnant to a partnership at will; that the surviving partners had, therefore, a right to purchase the share of K., and to be allowed the deduction of 20 per cent. therefrom as the deed provided; and that in the absence of any stipulation in the deed to the contrary the goodwill of the business and K.'s interest therein should be taken into account in the valuation to be made for such purpose. Appeal dismissed with costs.

Aylesworth, Q.C., for appellant. *Riddell*, Q.C., for respondent.

Ont.]

CASTON *v.* CITY OF TORONTO.

[June 12.]

Assessment and taxes—Ontario Assessment Act, R.S.O. 1887, c. 193, s. 135—Imperative or directory—Failure to distrain—Enforcing payment in subsequent year.

The provisions of s. 135 of the Ontario Assessment Act, R.S.O. 1887 c. 193, in respect to taxes on the roll being uncollectable, and what the account of the collector in regard to the same shall show on delivery of the roll to the treasurer, and requiring the collector to furnish the clerk of the municipality with a copy of the account, are imperative.

Taxes on the roll not collected cannot be recovered by distress in a subsequent year, unless such arrears have accrued while the land in respect of which they were imposed was unoccupied.

Judgment of the Court of Appeal, 26 A.R. 459, 35 C.L.J. 495, affirming the judgment of a Division Court, 30 O.R. 16, 35 C.L.J. 27, affirmed.

Fullerton, Q.C., and *W. C. Chisholm*, for appellants. *J. W. McCullough*, for respondent.

Ont.] DUEBER WATCH CASE CO. v. TAGGART. [June 12.

Bankruptcy and insolvency—Assignments and preferences—Sale of assets—Extinguishment of debt—Composition—Release of debtor.

T. and C., doing business under the name of T. & Co., made an assignment for the benefit of creditors, and T. then induced the plaintiffs, creditors, to pay off a chattel mortgage on the stock and a composition of 25 cents on the dollar of unsecured claims, the plaintiffs to receive their own debt in full with interest. The assignee of T. & Co. then transferred all the assets to the plaintiffs, and the arrangement was carried out, the plaintiffs eventually re-conveying the assets to T., taking his promissory notes and a chattel mortgage as security. In an action against T. & Co. on the original debt:—

Held, affirming the judgment of the Court of Appeal, 26 A.R. 295, 35 C.L.J. 387, that the original debt was extinguished, and C. was released from all liability thereunder.

C. Millar, for appellants. W. Nesbitt, Q.C., for respondents.

Que.] TALBOT v. GUILMARTIN. [June 12.

Appeal—Jurisdiction—Action for separation de corps—Money demand.

In an action by a wife for separation de corps for ill treatment the declaration concluded by demanding that the husband be condemned to deliver up to the wife her property valued at \$18,000. The judgment in the action decreed separation and ordered an account as to the property.

Held, that no appeal would lie to the Supreme Court from the decree for separation; *O'Dell v. Gregory*, 24 Can. S.C.R. 661, followed; and the money demand in the declaration being only incidental to the main cause of action could not give the court jurisdiction to entertain the appeal. Appeal quashed with costs.

Stuart, Q.C., for motion. Fitzpatrick, Q.C., contra.

N.S.] STARR, SON & CO. v. ROYAL ELECTRIC CO. [June 12.

Principal and agent—Sale by agent—Commission—Evidence.

The appellants dealt in electrical supplies at Halifax, and had at times sold goods on commission for the respondents, a company manufacturing electrical machinery in Montreal. In 1897 the appellants telegraphed the respondents as follows: "Windsor electric station completely burned. Fully insured. Send us quotations for new plant. Will look after your interest." The reply to this was: "Can furnish Windsor 180 Killowatt Stanley two phase complete exciter and switchboard, \$4,900, including commission for you. Transformers, large sizes, 75 cents per light. . . ." The manager of the appellants went to Windsor, but could not effect a sale of this machinery. Shortly afterwards a travelling agent of the respondents came to Halifax and saw the manager, and they worked together for a time

trying to make a sale, but the agent finally sold a smaller plant to the Windsor company for \$1,800. The appellants claimed a commission on this sale, and on its being refused brought an action therefor.

Held, affirming the judgment of the Supreme Court of Nova Scotia, GWYNNE, J., dissenting, that the appellants were not employed to effect the sale actually made; that the respondents offered the commission only on the sale of the specific plant mentioned in the answer to the request for quotations; and that there was no evidence of any course of dealing between the two companies which would entitle the appellants to such commission.

Cahan, for appellants. *Belcourt*, Q.C., for respondents.

N.S.]

SUMNER v. COLE.

[June 12.

Contract—Offer and acceptance—Telegrams—Completion—Mutuality.

S., a grain merchant in Truro, N.S., telegraphed to C., a grain merchant in Toronto: "Quote bottom prices 20 to 25 cars, thousand bushels each, white oats delivered, basis Truro freight, bagged in our bags even four bushels each." C. replied next day: "White oats 32 half, Truro, bags two cents a bushel extra." S. telegraphed on the same day: "How much less can you do mixed oats for? Might work white at 32, but not any more. Answer." C. answered: "Mixed oats scarce but odd cars obtainable half cent less. Exporters bidding for white. Highest freight, Truro freight two half over Halifax. Offer white 32 hulled, 34 half in 4 bushel bags, Truro." Next day S. wired: "I confirm purchase 20,000 bushels oats, white, at thirty-two, mixed at thirty-one half bagged even four bushels in my bags. Confirm. May get order five cars more in bulk." And he confirmed it also by letter. C. answered telegram at once: "Cannot confirm bagged. Am asked half cent for bagging. Bags extra." S. replied: "All right. Book order. Will have to pay for bagging." C. wired on the same day: "Too late to-day. Made too many sales already. Will try confirm to-morrow." On receipt of this S. wrote urging action, and next day wired: "Will you confirm oats? Completed sale receipt first telegram yesterday. Expect you to ship." C. answered next day: "Market advanced two cents here since yesterday noon. Had oats under offer expecting your order until noon yesterday. When you accepted bagged, parties demanded half cent for bagging. They sold before your second wire arrived yesterday. This is why I could not confirm. Think advance too sudden to last." He wrote to S. to the same effect that day. The oats were never delivered, and S. brought an action for damages.

Held, reversing the judgment of the Supreme Court of Nova Scotia, that there was no completed contract between the parties, as they did not come to an understanding in respect to some of the material terms, and S. could not recover. (See 35 C.L.J. 455)

W. J. O'Connor, for appellant. *Borden*, Q.C., for respondent.

Que.] ASSOCIATION PHARMACEUTIQUE v. LIVERNOIS. [June 21.

Appeal—Action for penalties—Plea of unconstitutionality of act—Judgment on other grounds.

The Association Pharmaceutique sued L. for \$325, penalties for selling drugs without license. L. pleaded 1. General denial. 2. That Pharmacy Act was ultra vires. The action was dismissed by the Superior Court for want of proof of the illegal selling alleged and this was affirmed by the Court of Queen's Bench. On motion to quash an appeal to the Supreme Court,

Held, STRONG C. J. and GWYNNE, J. dissenting, that if the Court should find error in the judgment appealed from the question of ultra vires pleaded by L. would have to be dealt with and the case was therefore appealable under s. 29 (a) of the Supreme Court Act, though no appeal would lie if this plea were not on the record. Motion to quash refused with costs.

Fitzpatrick, Q.C., for the motion. *Lajoie*, contra.

Province of Ontario.

COURT OF APPEAL.

From Divisional Court.] EVES v. BOOTH. [June 29

Dower—Husband and wife—Separation deed.

A covenant in a separation deed by trustees on behalf of the wife, that the wife will whenever called upon release her dower in any lands which the husband may acquire, is a bar to a claim by her to dower in lands afterwards acquired by him. Judgment of a Divisional Court, 35 C.L.J. 449; 30 O.R. 689, affirmed.

George Wilkie and *J. E. Irving*, for appellant. *A. Hoskin*, Q.C., for respondent.

From Meredith, C.J.] [June 29.

HORSMAN v. CITY OF TORONTO.

Assessment and taxes—Distress—Change of ownership—Chattel mortgage—Purchase from mortgagee.

Goods purchased from the chattel mortgagee thereof are not "claimed by purchase, gift, transfer or assignment" from the mortgagor within the meaning of R.S.O. c. 224, s. 135, sub-s. 4 (b), so as to make them liable in the purchaser's hands to distress for taxes due by the mortgagor. Judgment of MEREDITH, C.J., 31 O.R. 301, ante p. 29, affirmed.

Fullerton, Q.C., for appellants. *Brewster*, Q.C., and *Heyd*, Q.C., for respondent.

From Street, J.]

CLARK v. BELLAMY.

[June 29.

Executors and administrators—Negligence—Agent's fraud—Limitation of actions.

The Trustee Limitation Act, R.S.O. c. 129, s. 32, protects executors where relying in good faith on the statement of their testator's solicitor that he has in his hands securities sufficient to answer a fund they are directed by the will to invest for an annuitant. They distribute the estate, and it is afterwards found that before the testator's death the solicitor had misappropriated the money given to him by the testator to invest, and had in fact at the time of the representation no securities or money in his hands.

Payments made from time to time by the solicitor to the annuitant, ostensibly as of interest received by him from the fund, do not keep alive the right of action against the executors. Judgment of STREET, J., 30 O.R. 532, reversed.

S. H. Blake, Q.C., and St. John, for appellant Riseborough. Harding, for appellant Bellamy. Clute, Q.C., and Skeans, for respondent.

STEWART v. SNYDER.

[June 29.

Executors and administrators—Notice to claimants—R.S.O. c. 129, ss. 32, 38—Limitation of actions—Trustee Limitation Act—Reversionary interest—Trustee Relief Act—62 Vict., c. 15 (O.).

A notice by executors that "all parties indebted to the estate of the late (testator) are required to settle their indebtedness" by a named date, and that "parties having claims against said estate are also required to file same by said date" is not a sufficient notice within s. 38 of R.S.O. c. 129 to protect the executors from liability for claims not brought to their knowledge until after the estate has been distributed by them. Their liability in this respect extends to claims against their testator for money lost owing to a breach of duty by him as trustee.

Persons having a reversionary interest in a trust fund may bring an action to compel the trustee to make good money lost owing to his negligence, and the Trustee Limitation Act does not run against them from the time of the loss but only from the time their reversionary interest becomes an interest in possession.

After judgment had been given in the court below against the executors in this case the Act for the Relief of Trustees, 62 Vict., c. 15 (O), was passed:

Held, that, assuming the Act to apply to such a case, it did not relieve the executors, for they could not be held to have acted reasonably when they failed to follow the plain statutory directions as to notice to creditors and claimants.

DuVernet, for appellants. *M. Houston*, and *R. M. Thompson*, for respondents.

From Boyd, C.]

[June 29.

HIGGINS v. TRUSTS CORPORATION OF ONTARIO.

Executors and administrators—Mortgage—Purchaser of equity of redemption—Indemnity—Death of mortgagor—Release of purchaser.

The administrators of the insolvent estate of a deceased mortgagor are not liable in damages to his mortgagee as upon a devastavit, because they release the purchaser of the equity of redemption in the mortgaged property from his liability to indemnify the mortgagor in respect of the mortgage. Judgment of BOYD, C., 35 C.L.J. 453; 30 O.R. 684, affirmed.

R. U. Macpherson, and *G. C. Campbell*, for appellant. *Aylesworth*, Q.C., and *J. H. Moss*, for respondents.

From Divisional Court.]

[June 29.

MYERS v. BRANTFORD STREET RAILWAY.

Railways—Street railways—Negligence—Frightening horses.

An appeal by the defendants from the judgment of a Divisional Court (ARMOUR, C.J., FALCONBRIDGE, and STREET, JJ.) reported 31 O.R. 309, ante p. 67, was argued before BURTON, C.J.O., OSLER, MACLENNAN, MOSS and LISTER, JJ. A., on the 18th of May, 1900, and on the 29th of June 1900, was allowed with costs, the court agreeing with the reasons given by STREET, J., in his dissenting judgment in the court below.

J. A. Patterson, for appellants. *Brewster*, Q.C., for respondent.

From Street, J.]

REGINA v. MURDOCK.

[June 29.

Criminal law—Conviction—Certiorari—Amendment—Criminal Code, s. 889—Indian Act.

Under s. 889 of the Criminal Code, the Court, if a conviction under any Act to which the procedure in the Code applies, is brought up by certiorari (whether in aid of a writ of habeas corpus or on motion to quash the conviction is immaterial) may hear and determine the charge as disclosed by the depositions upon the merits, and may confirm, reverse, vary or modify the decision.

A conviction under the Indian Act, defective on its face, was amended by describing the offence accurately and by substituting for imprisonment for six months, and a fine of \$50.00 and \$5.00 costs or imprisonment for a further term of six months in default of payment of the costs or in default of sufficient distress, imprisonment for six months, and a fine of \$50.00 and \$5.00 costs or imprisonment for a further term of three months in default of payment of the fine and costs. Judgment of STREET, J., affirmed.

Du Vernet, for the prisoner. The Crown was not represented.

From Armour, C.J.]

FILE *v.* UNGER.

[June 29.

Master and servant—Parent and child—Negligence.

The doctrine of the liability of a master for his servant's negligence applies in the case of the implied relationship of master and servant sometimes existing between parent and child, but as in the case of master and servant so in that of parent and child there is no liability if at the time the negligent act is committed the child is engaged in his own affairs and not on the parent's behalf.

The father of a lad of twenty, living at home, was held not liable therefore for an accident caused by the lad's negligence while driving, with the father's implied permission, the father's horses and carriage home from a shop to which the lad had gone to purchase, with money earned by himself, articles of clothing for himself. Judgment of ARMOUR, C.J., reversed.

Thomson, Q.C., for appellant. *Aylesworth*, Q.C., for respondent.

From Ferguson, J.] CULBERTSON *v.* McCULLOUGH.

[June 29.

Estate—Estate tail—Bar of entail—Mortgage—Will—Construction.

By a will made in 1847 a testator, who died in 1854, devised to his son a piece of land, describing it, and proceeded: "All which shall be and is hereby entailed on my said son and his heirs for ever." In 1859 and again in 1860 the son granted the land in question in fee by way of mortgage, each mortgage being duly registered within a few days of its execution and each containing the usual proviso that it was to be void on payment at a named date. No discharge of either mortgage or reconveyance of the mortgaged land had been registered and there was no evidence whether either mortgage had in fact been paid:—

Held, per OSLER, and MOSS, JJ. A., that under this will the son did not take an estate tail. MACLENNAN, and LISTER, JJ. A., contra.

But *held*, also, per Cur., that even if the son did take an estate tail that estate tail had been barred and converted into an estate in fee simple in his own favour as well as in that of the mortgagee by the execution and registration of the mortgages.

Lawlor v. Lawlor, 10 S.C.R. 194, and *Plomley v. Felton*, 14 App. Cas. 61, applied. Judgment of FERGUSON, J., affirmed.

E. Gus Porter, for appellants. *Aylesworth*, Q.C., and *W. B. Northrup*, for respondent.

From Divisional Court.] KIMBALL *v.* COONEY.

[June 29.

Will—Construction—Annuity—Interest on fund.

A testator by his will directed his executors "to take as much of my estate and moneys to be put to interest as will make \$200 of interest per year, said amount of \$200 to be paid to my beloved wife each and every

year of her life, said \$200 to be paid by my executors to my beloved wife on the 1st day of January next after my decease, and every subsequent payment to be paid on the 1st day of January in each and every year thereafter. At the death of my said wife said principal to be equally divided between my brothers." There were specific devises of some real estate and chattels, and the residue was not sufficient to produce \$200 a year :—

Held, affirming the judgment of a Divisional Court, that the widow was entitled to \$200 a year, and to use the corpus for that purpose.

Hughson, for appellants. *Fish*, for respondent.

From Divisional Court.] REGINA v. DAVEY.

[June 29.

Criminal law—Trespass—Damage to property—"Fair and reasonable supposition of right—Water and watercourses—Access to shore—Crown grant.

The honest belief of a person charged with an offence under R.S.O. c. 120, s. 1 (unlawfully trespassing), or the Criminal Code, s. 511 (wilfully committing damage to property) that he had the right to do the act complained of, is not sufficient to protect him ; there must be fair and reasonable ground in fact for that belief.

The usual reservation in a patent of land bounded by navigable water of "free access to the shore for all vessels, boats and persons," gives a right of access only from the water to the shore, and in this case a person how had broken down fences and had driven across private property to the shore was held not to be able to successfully assert, when charged under R.S.O. c. 120, s. 1, and the Criminal Code, s. 511, that he "acted under a fair and reasonable supposition of right" in so doing. Judgment of a Divisional Court affirmed.

Clute, Q.C., and *G. F. Ruttan*, for appellants. *Aylesworth*, Q.C., and *J. H. Madden*, for respondent.

From Armour, C.J.]

[June 29.

WINTEMUTE v. BROTHERHOOD OF RAILROAD TRAINMEN.

Insurance—Life insurance—Benevolent society—Beneficiary certificate—Forfeiture—Non-payment of dues—Rules—Conditions—60 Vict., c. 36, s. 144 (O.).

The defendants were an unincorporated union or society of workmen of a particular class, having their head office in a foreign country, with unincorporated branches or lodges in this province :—

Held, that beneficiary certificates issued by them to members, entitling members or their representatives, upon payment of certain assessments and compliance with certain conditions, to certain pecuniary benefits were not

subject to the provisions of s. 144 of the Ontario Insurance Act, 60 Vict., c. 36.

Held, also, that even if the Act did apply, a beneficiary certificate not containing an absolute contract to pay any sum, but stating merely that upon compliance with the conditions, and upon payment of the assessments, directed by the constitution, the sum authorized by the constitution would be paid, and that any default would render the certificate void, was not within the section and that the conditions of the constitution must be read into it in determining its validity. Judgment of ARMOUR, C.J., reversed.

Clarke, for appellants. *Davis*, for respondent.

HIGH COURT OF JUSTICE.

Rose, J.]

ROSS v. THE QUEEN.

[June 12.

*Succession Duty Act—Deduction of debts—Compromise of claim
by executors—R.S.O. c. 24, s. 3, sub.-s. 3.*

Held, that for the purpose of arriving at the aggregate value of the property of a deceased person under s. 3, sub.-s. 3 of the Succession Duty Act, R.S.O. c. 24, debts are to be deducted. The duty to be paid by the person who takes is on the value of the estate which he takes at the time of taking; and the estate on which the duty is to be paid is the surplus estate after payment of debts.

Held, also, that a certain sum bona fide paid by executors for the purpose of settling a claim against them as such, must be considered a debt for the purpose of administration and of ascertaining the amount of succession.

Macdonald, Q.C., for petitioner. *J. R. Cartwright*, Q.C., contra.

Rose, J.]

IN RE SEBERT v. HODGSON.

[June 13.

*Division Court Act—Amendment at trial—Endorsement on
summons beyond jurisdiction—Prohibition.*

Motion for prohibition.

Held, that a Division Court Judge has powers to allow a plaintiff at the trial to amend his particulars and substitute for a claim beyond the jurisdiction a claim within the jurisdiction; and where the defendant does not insist on re-service of the summons, but proceeds to answer the claim, and the trial proceeds, and the Judge finds the facts so as to shew jurisdiction, and the judgment entered is within the jurisdiction of the Court, prohibition should not be granted.

R. McKay, for defendant. *W. E. Middleton*, for plaintiff.

Rose, J.] SALE v. LAKE ERIE & DETROIT R. W. Co. [June 15.

Words "in a summary way"—Reference of matters in dispute in an action—Right of appeal.

Proceedings in an action upon a solicitor's bill were stayed upon a certain agreement being entered into between the parties, whereby it was provided that evidence as to services rendered and disbursements made was to be given to a certain accountant named, and, "in case of dispute as to services rendered or disbursements made, the matters disputed are to be referred in a summary way to F. E. Marcon, Deputy-Clerk at Windsor, under R.S.O. c. 174 for decision."

Held, that by "a summary way" the parties meant that the reference was to be without ceremony or delay, the words "under R.S.O. c. 174" merely introducing the procedure under that Act (the Act respecting solicitors), but not to be construed as providing for an appeal.

Anglin, for plaintiff. *W. H. Blake*, for defendants.

Armour, C.J., Street, J.] [July 3.

IN RE TOWNSHIPS OF METCALFE, ADELAIDE AND WARWICK.

IN RE TOWNSHIPS OF COLCHESTER NORTH, GOSFIELD NORTH.

Costs—Scale of—Appeal from judgment of Drainage Referee.

Having regard to ss. 111, 112, and 113 of the Municipal Drainage Act, R.S.O. c. 226, and no tariffs of fees having been framed thereunder, the tariff of the County Court applies not only to proceedings before the Drainage Referee, but to appeals from his decisions; and therefore the basis of taxation of the costs of an appeal to the Court of Appeal from the decision of the Referee should be the County Courts' tariff.

Riddell, Q.C., for Gosfield North. *Folinsbee*, for Metcalfe. *Langton*, Q.C., for Colchester North. *C. A. Moss*, for Adelaide and Warwick.

Armour, C.J., Falconbridge, J., Street, J.] [July 3.

BABCOCK v. STANDISH.

Costs—Scale of—County Court—Payment into Court—Sum within competence of Division Court—Acceptance by plaintiff—Order for set-off—Finality—Appeal.

The plaintiff in an action in a County Court claimed \$140, the balance alleged to be due upon the sale of a chattel, and the defendant brought into Court \$95 in full of the plaintiff's cause of action, which the plaintiff accepted in due time. The Judge of the County Court thereupon made a summary order allowing the defendant to set off his costs incurred in the County Court in excess of such costs as he would have incurred in a Division Court against the costs of the plaintiff, and to enter judgment and issue execution for the excess, if any, of the costs of the defendant over and above the costs of the plaintiff.

Held, that the plaintiff was entitled to tax his costs of the action according to the County Court scale, irrespective of the amount paid into Court and accepted by him in satisfaction of his claim; and the plaintiff being entitled to his costs by the express provision of Rule 425 (which is not qualified by Rule 1130), they were not subject to the discretion of the Judge.

Held, also, that the order of the Judge was in its nature final, and therefore appealable under s. 52 of the County Courts Act, R.S.O. c. 55.

W. H. Blake, for plaintiff. *W. E. Middleton*, for defendant.

Street, J.]

ARMSTRONG v. JOHNSTON.

[July 3.

Bankruptcy and insolvency—Preference—Promise to give security—Presumption—Rebuttal—Payment—Transfer of security—Cheque—Promissory notes—Discount by third person.

In April, 1898, a firm of traders, desiring to purchase goods, obtained from a bank accommodation to the extent of about \$8,200 for the purpose of buying them, upon promissory notes indorsed for their accommodation by the defendant, a brother of one of the parties; they promising him to retire the notes out of the proceeds of the sales of the goods. The proceeds were not so applied, to the defendant's knowledge, and the notes were from time to time renewed in full, the defendant indorsing them upon each renewal. He was satisfied by a general promise that they would secure him, but no security was ever definitely mentioned, nor did he ever press for it. On the 27th May, 1899, the firm sold out their assets for nearly \$11,000, their liabilities being about \$19,000. Before the sale was carried out the defendant became aware that the firm was insolvent. The purchase money was paid to the firm, \$1,000 in cash, \$5,000 by a cheque to their order and the remainder by promissory notes. The firm handed over the cash to the defendant, and indorsed the cheque and some of the notes to him, and he with the cash and the proceeds of the cheque and the notes, the latter being at his request indorsed and discounted by a stranger for him, retired all the notes upon which he was liable, and paid, besides, some rent, taxes, and other debts due by the firm. On the 2nd June, 1899, the firm assigned to the plaintiff for the benefit of their creditors; and this action was afterwards brought to recover from the defendant the amount applied in retiring the notes, upon the ground that he had been unjustly preferred.

Held, that the promise to give the defendant security could only mean that the firm, being unable to pay or secure the notes for fear of bringing on immediate insolvency, would pay or secure them in the future in case their affairs should become desperate, and such a promise was not sufficient to rebut the statutory presumption of a preference: *Webster v. Crickmore*, 25 A. R. 97; *Ex p. Fisher*, L.R. 7 Ch. 636; *Cassels's Assignments Act*, 3rd ed., p. 14.

The payment of \$1,000 in cash to the defendant could not be attacked, and that sum should be treated as having formed part of the sum of \$5,200 paid to retire two of the notes.

The \$5,000 cheque transferred to the defendant was not a payment in cash but was the transfer of a security, and he was liable to repay the proceeds of it, less the portion expended in paying debts, etc., of the firm; *Davidson v. Fraser*, 23 A.R. 439.

The notes indorsed by the firm, and handed to the defendant for the purpose of procuring the payment of the remaining note which he had indorsed for them, were handed by him to the stranger in pursuance of that purpose, and what the latter did was done for the defendant, and not for the firm, and must be treated as if done by the defendant himself: *Botham v. Armstrong*, 24 Gr. 216; *Churcher v. Cousins*, 28 U.C.R. 540.

Gibbons, Q.C., for plaintiff. *Magee*, Q.C., for defendant.

Rose, J.]

KIRBY v. RATHBURN CO.

[July 4.

Company—Winding-up—Mortgage to creditor—Setting aside—Insolvency—Knowledge—"May be set aside"—Presumption—Rebuttal—R.S.C. c. 129, ss. 68-71.

A mortgage of land made by an incorporated company in favour of a creditor within thirty days prior to the beginning of winding-up proceedings was attacked by the liquidator as being void under some of the provisions of ss. 68 to 71, inclusive, of the Winding-up Act, R.S.C. c. 129.

Held, 1. Notwithstanding the fact that the mortgage was given upon demand of the mortgagee, the transaction must be avoided under s. 69, the mortgage being a conveyance for consideration respecting real property, by which creditors were injured or obstructed, made by a company unable to meet its engagements; and it was not material under this section whether the mortgagee was or was not ignorant of such inability; but the transaction, being within the thirty days, was voidable, and should therefore be set aside, that being the effect of the words "may be set aside."

2. The words of s. 69, "upon such terms as to the protection of such person from actual loss or liability by reason of such contract, as the Court orders," are not applicable to the giving of a mortgage as security for a past debt.

3. None of the other sections relied on apply so as to avoid the mortgage; and, following *Lawson v. McGeoch*, 22 O.R. 474; 20 A.R. 464, and distinguishing *Webster v. Crickmore*, 25 A.R. 97, the presumption referred to in s. 71 is rebuttable.

Orde, for plaintiffs. *Hogg*, Q.C., for defendants.

Armour, C.J., Falconbridge, J., Street, J.]

[July 9.]

TUFTS v. PONESS.

Sale of goods—Non-acceptance—Contract—Tender—Waiver—Damages—Price of goods—Property not passing—Possession—Judgment—Payment into Court.

On the 30th May, 1899, the plaintiff and defendant agreed in writing for the sale by the former to the latter of certain goods for \$175, payable \$30 on receipt of bill of lading for or tender of the goods, and the balance to be paid in instalments, for which promissory notes were to be given; the property to remain in the plaintiff until payment of the notes, but the goods to be shipped as soon as possible. On the 6th June the plaintiff sent the defendant an invoice of the goods. On the 14th June the defendant wrote to the plaintiff refusing to proceed with the contract upon the ground that the invoice price was not that agreed upon. On the 15th June the plaintiff advised the defendant that the goods had been shipped and draft and notes forwarded. Some correspondence ensued, but the defendant adhered to his refusal to take the goods. The goods arrived at the town where the defendant lived on the 10th July, and the defendant on the 20th July again wrote to the plaintiff that he had supposed that the plaintiff had concluded not to ship the goods, and again refused to take them, giving as a ground that the season for use of them had passed, and saying that they were now at the station at the plaintiff's risk.

Held, that the defendant having refused to perform his contract on the 15th June, at which date he did not contend that there had been default on the plaintiff's part, and his refusal remaining unretracted down to the time of the arrival of the goods in July, his right to require tender at the date fixed for the performance was waived: *Ripley v. McClure*, 4 Ex. 345; *Benjamin on Sales*, 7th Am. ed., 789.

Held, also, that the plaintiff was entitled to recover the full price of the goods as damages for breach of the contract, upon the ground that the right to the possession of the goods having been transferred by the plaintiff to the defendant, the plaintiff had done all that he was required by the contract to do to entitle himself to payment of the price. The stipulation by which the property in the goods was to remain in the plaintiff during the term of credit, notwithstanding the delivery of possession to the defendant and the fact that the plaintiff had given up possession to the defendant, as far as he could, took the case out of the general rule which prevents a vendor from recovering the price where he has not parted with the property in the goods.

Held, further, that the defendant should be allowed to pay the amount of the judgment and costs against him into Court, to be paid out to the plaintiff upon his shewing that the defendant could still obtain possession of the goods.

F. E. Hodgins, for defendant. *F. A. Anglin*, for plaintiff.

Meredith, C.J.] GEARING v. ROBINSON. [July 13.

Costs—Mechanic's lien—Appeal—R.S.O. c. 153, ss. 41, 42, 45.

Secs. 41 and 42 of the Mechanics' and Wage-Earners' Lien Act, R.S. O. c. 153, limiting "the costs of the action under the Act" to twenty-five per cent. of the judgment, besides actual disbursements, do not apply to the costs of an appeal from the decision of the Judge or officer trying the action.

Semble, that the costs of such an appeal are within the scope of s. 45. *Du Vernet*, for plaintiff. *W. N. Ferguson*, for defendants.

Meredith, C.J., Falconbridge, J.] [July 18.

PLESTER v. GRAND TRUNK R. W. CO.

Railways—Farm crossing—51 Vict., c. 29, s. 191—"Farm purposes"—Injury to stranger—Duty—51 Vict., c. 29, s. 289.

The defendants having, in compliance with the requirements of s. 191 of the Railway Act of Canada, 51 Vict., c. 29, made, and assumed the duty of keeping in repair, a crossing over their railway where it crossed a certain farm, nevertheless allowed it to get into an unsafe and defective condition whereby a horse of the plaintiff was injured. The plaintiff was at the time using the horse, with the permission of the owner of the farm, in hauling gravel from a part of the farm to the highway, for which purpose it was necessary to cross the railway.

Held, without deciding whether the right of user of such a crossing is limited to a user for farm purposes, but assuming it to be so limited, that the hauling of gravel was, under the circumstances, a farm purpose, and that the defendants owed a duty, even apart from s. 289, towards one using the crossing by invitation of the owner.

Nesbitt, Q.C., and *H. E. Rose*, for defendants. *Buckingham*, for plaintiff.

COUNTY COURT OF THE COUNTY OF YORK.

WARWICK v. THE COUNTY OF SIMCOE.

Municipal law—Liability of county for cost of advertising list of lands for sale for arrears of taxes—Persona designata—Mun. Act, ss. 271, 274.

Held, 1. A county municipality is not liable for the cost of advertising the county treasurer's list of lands for sale for arrears of taxes, although sent to the plaintiff by the county treasurer.

2. The county treasurer does not act as an officer of the corporation in relation to tax sales, and the duties connected therewith are not within the scope of his authority as county treasurer. He is merely persona designata on behalf of the local municipalities, and a creditor must look to him personally.

[TORONTO, FEB. 26, McDougall, Co. J.

This was an action brought to recover the amount of an account for publishing an advertisement of the County Treasurer's list of lands in the

County of Simcoe, for sale for arrears of taxes in the year 1896. The advertisement was forwarded to the plaintiffs by S. J. Sanford, treasurer of the county of Simcoe, in a letter dated 20th October, 1896. The letter directed the advertisement to be inserted the usual number of times, and ordered certain extra copies. It was written on paper with the printed heading, "County of Simcoe, County Treasurer's Office," and was signed S. J. Sanford, "Treasurer County of Simcoe," the last three words being in print. The advertisement was duly inserted, the charge therefor being entered in the plaintiffs' books to the debit of S. J. Sanford, Barrie. Accounts were afterwards rendered, made out and mailed to him. Nothing appears in the plaintiff's books, or in the several accounts produced as rendered, to indicate the official position or office held by Sanford. In 1897 Sanford, who was in fact treasurer for the county of Simcoe, absconded from Ontario, a defaulter for a large amount of the defendants' funds.

Evidence was given to show that in 1894, 1895, and 1896 Sanford paid former accounts to the plaintiffs for similar advertisements by issuing cheques signed by himself and countersigned by one R. H. Stewart (a gentleman said to have been appointed by the county council to countersign the treasurers' cheques, and who was also assistant treasurer), and drawn upon a bank account kept in the Bank of Toronto in the defendants' name.

J. W. Curry for the plaintiff: The defendants are liable to pay, because Sanford, as county treasurer and as an officer of the defendants, gave the order for the services charged for; that to direct the publication of this advertisement was within the scope of his authority as county treasurer, and constitutes it a debt payable by the defendants. The account not having been paid by Sanford it is recoverable from the defendants. He relied strongly upon ss. 271 and 274 of the Assessment Act as establishing the liability of the county.

F. E. P. Pepler, Q.C., for the defendants: In taking any proceedings in connection with the sale of lands for taxes, the county treasurer is a statutory officer, and does not act as an official of the county, or for them in their corporate capacity. With regard to the moneys passing through his hands arising from such sales, he is bound to account for them not to the county, but to the various local municipalities who have forwarded to him their several lists of lands liable to be sold for arrears of taxes; that as such statutory officer, and pursuant to the various provisions of the Assessment Act he must advertise and sell for the sole benefit and advantage of such local municipalities. With respect to the costs of advertising, etc., and his own commission (fixed by the statute and connected with such sale proceedings), he is directed by the statute to proportion the amount of such costs and commission over all the lots in his list to be sold, and the proportion so charged against each lot is directed to be added to the arrears of taxes, and so far as the owner of the land is concerned such costs and charges are to be treated as part and

parcel of the tax arrears. Except for the provision made by ss. 271 and 274, the county would not be liable even to the local municipalities for the proceeds of tax sales coming into the county treasurer's hands, should they not be duly accounted for by the treasurer. The fact that the treasurer keeps track of his dealings with these various local municipalities, in regard to the land sales in the books of the county does not create any liability against the county, or in any way alter the status of the county treasurer qua these tax sales. The county is not entitled to any of the proceeds of such sales, taxes, costs or commissions. The county does not pay and is not bound to pay the treasurer out of county funds for any of his services in connection with such sales. If in the course of realizing for a local municipality the taxes forwarded to him, for collection according to law, the result of a sale did not produce sufficient money to pay said arrears, and the proportion of the cost and charges attending such sale, the local municipality would be charged with the deficiency. The county treasurer might, and did in some instances in the County of Simcoe, recoup himself from county funds for such deficiency, but the payments so made out of county funds were in all cases charged against the local municipality as a disbursement on their account and would appear in the general account in the county's ledger relating to such local municipality. Nowhere in the Assessment Act is any duty cast upon the county by name or inference to conduct these sale proceedings for taxes. No county property is sold. No benefit directly or indirectly accrues to the county as a corporation.

MCDUGALL, Co. J.—It appears to me that the county treasurer is not acting as an officer of the corporation in relation to tax sales nor is the act a corporate act. The legislature, instead of leaving to each local municipality the duty of realizing the arrears of taxes existing against the lands in their municipality to their own officers, have named a statutory officer to conduct such sales. They could have named the Sheriff or the Clerk of the Peace as the official to perform these duties. They, however, selected the county treasurer as an individual by name of his office. They could, had they desired, directed that the county through their officials should perform these duties, but they have not chosen to do so. It appears to me that by selecting an officer of the defendants for this purpose the legislature has not imposed any legal liability upon the county for the acts of such officer in connection with the performance of the duties directed by the statute except the liability imposed by s. 271. That section reads as follows:—

“Every county, city and town shall be responsible to Her Majesty and to all other persons interested that all moneys coming into the hands of the treasurer of the country, city or town in virtue of his office shall be by him duly paid over and accounted for according to law.”

This means, in my opinion, that any person paying the treasurer money is entitled to have it applied according to law. The taxpayer, the local municipalities, private individuals paying money to the treasurer for

the use of the county or for the use of the local municipalities are entitled to have it reach its proper destination and if the treasurer fails to pay over the amount so placed in his hands the county must make good the default; but a creditor with a claim against the treasurer as a statutory officer is not, in my judgment, within the protection of this section. Section 274 appears to me to support this view, for it settles the form of action: "Any person aggrieved by the default of the treasurer may recover from the corporation of the county, city or town the amount due or payable to such person as money had and received for his use."

Now, here it could not be reasonably contended that there were any moneys in the hands of the county treasurer of the County of Simcoe which were moneys had and received for the use of the plaintiffs. The moneys in the hands of the treasurer were moneys had and received for the use of the local municipalities. They are moneys paid by taxpayers, had and received by the treasurer to be applied in payment of their taxes due the local municipalities; but the moneys collected by the treasurer for his costs of advertising and commissions were not moneys had and received for the use of the plaintiffs in the sense contemplated by s. 274. The treasurer was not bound to account for these moneys either to the local municipality or the county. It is true he was expected out of these moneys to pay any outlay made by him, or indebtedness for advertising, but the statute does not make these expenditures a charge against either the local municipality or the county. The statute authorizes the county treasurer to collect from the ratepayers in arrears for taxes an additional amount to reimburse himself for incidental disbursements in connection with the performance of his statutory duties. It evidently contemplates that he will pay these amounts in the first instance out of his own personal funds. If credit is given to him by the persons publishing the advertisements that is a matter exclusively between himself and the creditor. Creditors of that class cannot look beyond the individual authorized to make the expenditure, not as a corporation, but as *persona designata*.

Under sub-s. 2 of s. 184 of the Assessment Act the county treasurer is only to account to the local municipality for the full amount of the taxes paid. Sec. 181 directs him to add to the arrears published his commission or other local charges and the cost of publication. Sec. 177 directs him to include in a separate column the proportion of costs chargeable on each lot for advertising and for the commissions authorized by this Act to be paid to him. The person paying to the treasurer arrears of taxes pays two amounts—the arrears of taxes to be remitted by the treasurer to the municipality, and the proportion of costs of advertising and commissions in respect of his lot—the latter for the treasurer's personal use to recoup him *pro tanto* his disbursements for the cost of advertising and for his commission for collecting the arrears due in respect of the lot that is being settled for. This commission is fixed in the statute itself by s. 196 at $2\frac{1}{2}$ per cent. on all sums over \$10, and a fixed sum of 25c. for \$10 and under.

Dillon, in his admirable work on municipal corporations, thus describes the liability of corporations for the act of an official appointed by them to perform statutory duties:—

“It will be seen, on general principles, it is necessary, in order to make a municipal corporation impliedly liable on the maxim of respondeat superior for the wrongful act or neglect of an officer, that it be shown that the officer was its officer, either generally or as respects the particular wrong complained of, and not an independent public officer; and, also, that the wrong was done by such officer while in the legitimate exercise of some duty of a corporate nature which was devolved on him by law or by the direction or authority of the corporation.”

Par. 980 further states this doctrine: “The doctrine may be considered as established, where a given duty is a corporate one—that is, one which rests upon the municipality in respect of its special or local interests, and not as a public agency, and is absolute and perfect, and not discretionary or judicial in its nature, and is one owing to the plaintiff, or in the performance of which he is specially interested, that the corporation is liable in a civil action for the damages resulting to individuals by its neglect to perform the duty, etc.”

Par. 981: “The liability of the corporation for its own negligence, or for its servants’, is especially clear, and, in fact, indisputable, where it has received a consideration for the duty to be performed or where, under permissive authority from the legislature, it voluntarily assumes and carries on a work or undertaking from which it receives tolls or derives a profit.”

In *McSorley v. Mayor of St. John*, 6 S.C.R. 531, the whole question is very ably and fully considered as to the extent of the liability of corporations for the acts of persons appointed by them pursuant to a statute to perform statutory duties assigned by the Legislature, and although on the peculiar facts of that case the corporation were held liable by a majority of the judges, the statement of the legal principles applicable in determining the liability of a corporation for the acts of an officer, though appointed by them, for acts performed by such officer pursuant to statutory directions, as laid down by Chief Justice Ritchie in his dissenting judgment have since been approved of by our own Court of Appeal in *Seymour v. Maidstone*, 24 A.R. p. 376. This latter case decided that the acts of a civil engineer appointed by the county in performing certain statutory duties set out in the Ditches and Watercourses Act, R.S.O. 285, were not acts of the corporation and that the municipal corporation were not liable to the plaintiff for any irregularities or other improper performance of his duties by the engineer. Judge Osler based his judgment upon the fact that for the purposes of that act, the engineer was an independent officer though appointed by the corporation. His duties were fixed and prescribed by the statute. The council and the corporation could exercise no judgment nor give him instructions, nor have any control over his proceedings. In my view the county treasurer in conducting tax sales under the provisions of the

Assessment Act occupied a similar position though appointed to his office by the corporation. His duties in relation to tax sales were fixed and prescribed by statute. The defendants could exercise no judgment or control over his proceedings nor were these proceedings taken for their benefit, advantage or profit.

In *Black v. Harrington*, 12 Grant 175, Spragge, V.C., in an action to set aside a sale of land for taxes, in which the county was made a party defendant said:—"I confess I do not see how there can be any remedy over against the county. . . . The treasurer and sheriff in so acting (conducting the sale) are the instruments for enforcing payment for the several municipalities, and for their benefit, and not for the benefit of the county. The county itself has nothing to do with the sale. Its only connection with it, if connection it can be called, is that two county officers, upon whom the legislature has cast certain municipal duties for the benefit of townships, towns, and the like, have been the instruments for the sale of land for taxes, by which sale the owner of certain land has been aggrieved. It would be an anomaly to make the county liable under such circumstances." The appeal was dismissed with costs as against the county. See also *Charlton v. Watson*, 4 Ont. R. 493, and *Mills v. McKay*, 14 Grant 602.

Counsel for the defendants rely also upon the alleged election by the plaintiffs to treat Sanford as their debtor. The plaintiffs were aware that he was county treasurer and chose to charge him personally in their books, and bill him personally with the account. It was only after Sanford's departure from Ontario that the plaintiffs changed their attitude and sought to make the defendants liable. I think that apart from the question thus raised relating to the doctrine of principal and agent a further difficulty meets the plaintiffs. A municipal corporation is a pure creature of the statute, and it is unquestionable that it is not bound by the unauthorized act of an individual whether an officer of the corporation or a mere private person. The defendants indeed might be bound by an executed contract for small matters of county business of frequent occurrence of which contract they had full knowledge and had taken or received the benefit; but was the ordering the insertion of an advertisement in a newspaper or the *Ontario Gazette*, which related exclusively to the sale of land for arrears of taxes, situate in various local municipalities a matter in which the county was at all concerned? Neither the Municipal Act nor the Assessment Act imposed any such duty upon the county. As a county they derived no benefit or advantage from its performance nor did they become entitled to any part of the money proceeds resulting from the sale. As I have observed the Legislature assigned all the duties created by the Assessment Act in connection with tax sales to a county official as persona designata. In my judgment the county was in no sense responsible for the performance of these duties, save to the extent provided for by section 271 of the Assessment Act; nor liable to provide means to enable the treasurer to carry

them out. The act generally was not one within the scope of the authority of the county treasurer as an agent of the corporation. There therefore could be no exercise of an implied authority which would bind the corporation. The evidence fails to show any express authority or direction from the corporation to make the contract. The defendants were not principals in this transaction, nor was Sanford their agent for any such purpose. If there were any principals they would be the various local municipalities whose business was being conducted by Sanford pursuant to the statutory powers and directions.

I make the further extract from Dillon, par. 460:—

“In reference to money or other property it is not difficult to determine in any particular case whether a liability with respect to the same has attached to the city. The money must have gone into her treasury or been appropriated by her, and when it is property other than money it must have been used by her or be under her control. But with reference to services rendered the case is different. Their acceptance must be evidenced by ordinance or express corporate action to that effect. If not originally authorized no liability can attach upon any ground of implied contract. The acceptance upon which alone the obligation would arise would be wanting.”

In discussing the liability of a corporation upon an executed contract, not under seal, Mr. Justice Gwynne, in *Bennardin v. Municipality of North Dufferin* commenting on the case of *Sanderson v. Guardians of the St. Neol's Union*, 8 Q.B. 810 makes the following remarks:—

“The court, it is submitted, based their judgment in that case upon a sound and rational principle equally applicable in the case of every corporation and not limited to trading corporations only, namely, where work has been executed for a corporation under a parol contract, which work was within the purpose for which the corporation was created and it has been accepted and adopted and enjoyed by the corporation after its completion, it would in such case be fraudulent for the corporation while enjoying the benefit of the contract to refuse to pay for it upon the ground that the contract in virtue of which it had been executed was invalid for want of the corporate seal and that justice required that it should not be permitted to commit such a fraud.” See also *Haigh v. North Brierly Union*, 1 E.B. & E. 873. The question of the liability of the defendants in this case is rather one of fact than of law, namely, where the work performed by the plaintiffs was incidental to the purpose for which they as a municipal corporation were created, and I am of opinion that it was not.

After a careful consideration I am of opinion that the plaintiffs have failed to establish any liability on the part of the defendants, the County of Simcoe, to pay their claim. The action will be dismissed with costs.

Province of Nova Scotia.

SUPREME COURT.

Graham, E. J., in Chambers.]

[July 4.

MONTREAL TRADING STAMP CO. *v.* CITY OF HALIFAX.

Trading stamps—B. N. A. Act—Ultra vires—Provincial legislature—Property and civil rights—Threats of criminal prosecution made by police officers.

Application for a restraining order to restrain defendants from sending their police officers to call on merchants and threaten them with prosecution for violation of c. 57 of the Acts of 1899—an act against the use of trading stamps, etc., and to prevent said defendants from so prosecuting on the grounds (1) That it is illegal and against public policy for police officers to visit merchants and so threaten them, and (2) that the act was ultra vires the Provincial Legislature as not coming within the head of "Property and Civil Rights" and was a criminal act.

Congdon and Mellish, for the applicant. *Drysdale*, Q.C., and *W. B. MacCoy*, contra.

GRAHAM, E. J.,—The Legislature of Nova Scotia by c. 57 of the acts of 1899 amended the charter of the City of Halifax. Section 2 of that act is to the following effect, "No person . . . shall give, sell or dispose of trading stamps, tickets or cards to any persons . . . doing business in the City of Halifax, nor shall such persons so doing business in the City . . . take or have in his possession any such trading stamps . . . nor shall any vendor give, sell or dispose of any such trading stamps . . . to any of his customers whereby such customer shall be entitled to receive for such trading stamp . . . any money, personal property. . . ."

The Trading Stamp Co. (so-called) is prohibited from doing business in the city, etc. "Any person violating this section . . . shall be imprisoned in the city prison for nine months with hard labor."

The plaintiff has entered into a contract with several merchants in the city to supply them with trading stamps at 50 cents per hundred, and they must supply one to their customers on demand—a trading stamp for every ten cents worth of goods bought by the customer. When the customer has accumulated the book full of trading stamps, about 990, he is entitled to receive from the Trading Stamp Co. a premium in goods of sorts, that is to say triple plated silverware. The Stamp Co. prints and circulates a directory containing the names of the merchants. John F. Ryan, one of the merchants, makes an affidavit that two policemen notified him that if he did not cease giving out trading stamps or dealing with them he would be prosecuted under this act and he has ceased dealing in stamps, and

the manager of the plaintiffs alleges in her affidavit that she has contracts with some 18 firms. A directory is also produced which explains the system.

A summons was taken for an injunction to restrain the city from threatening to prosecute, etc., and from inducing people to violate their contracts with the plaintiffs. A police sergeant and policeman were joined as parties. It was contended that the act was ultra vires the Provincial Legislature. In my opinion it comes within the head "Property and Civil Rights, etc.," or matters of a merely local or private nature in the Province, and is not a criminal law: *Attorney-General of Ontario v. Attorney-General of Canada* (1896), A.C. 364; *Reg. v. Wason*, 4 Cart. 578; *Keefe v. McLennan*, 2 Cart. 400.

Then it was contended that it was illegal for the city to send a policeman to notify a citizen to desist from violating a provision of the charter or he would be proceeded against under the act. There is no evidence of any illegal act on the part of the city or policeman.

The summons will be dismissed, the costs to abide the event.

Province of Manitoba.

QUEEN'S BENCH.

Bain, J.]

SINCLAIR v. PRESTON.

[June 20.]

Contract — Rectification — Partnership — Effect of taking judgment for claim—Interest.

The defendant in October, 1889, contracted with one Charlebois to build certain fences and gates along the line of the G.N.W. Central Railway and, after associating the defendant Musson with him, they sublet the contract to the plaintiffs by a written agreement which provided for payment to the plaintiffs as follows: "Estimates for the said work shall be made monthly by the company to the engineer, or at such other times as said engineer shall deem reasonable and proper, and such estimates, less ten per cent. rebate, shall be paid forthwith upon same being paid to said Preston & Musson by said company, and the said ten per cent. rebate shall be paid forthwith upon the same being paid to them by the said company."

Charlebois was the contractor for the whole of the railway work being done by the company, and the evidence showed that the word "company" in the above provision was inserted by mistake for Charlebois.

After payment of two estimates for part of the plaintiffs' work difficulties arose and the company's engineer, who also acted as engineer for Charlebois, to prevent the bringing of an action, withheld further estimates, but in September, 1890, after litigation between Charlebois and the company had commenced, Preston accepted a judgment against the company

for the balance due to him by Charlebois on his fencing contract. This judgment, however, was not paid till 1898, and then it was paid without interest.

Held, 1. The agreement between the plaintiffs and defendants should be treated as if Charlebois had been mentioned in it instead of the company, and should be rectified if necessary.

2. By accepting the judgment against the company, Preston had put it out of his power to insist on getting further estimates from the engineer for his work and it should be considered, as between Preston and the plaintiffs, that he was thus paid the balance due on the contract, and the plaintiffs could then have brought their action: *Atway v. Huldips*, 2 Mod. 266; *Pillrow v. Pillrow*, 5 C.B. 439, and were therefore entitled to interest for six years and not merely from 1898, when Preston was actually paid.

3. Under 3 & 4 Wm. IV., c. 42, s. 28, the plaintiffs were entitled to interest, as the money was payable by virtue of a written instrument at a certain time within the meaning of the statute: *Duncombe v. Brighton Club Co.*, L.R. 10 Q.B. 371.

4. The defendant Musson was bound by Preston's action in accepting the judgment just as he would have been by a payment made by Charlebois to Preston.

Ewart, Q.C., and *Wilson*, for plaintiffs. *Elliott*, for defendants.

Province of British Columbia.

COURT OF CRIMINAL APPEAL.

REGINA v. UNION COLLIERY COMPANY.

[May 8.

Criminal law—Manslaughter—Grievous bodily injury—Indictment of corporation—Punishment—Criminal Code, secs. 191, 192, 213, 252, 639 and 713.

The defendants, a corporation, were indicted for that they unlawfully neglected, without lawful excuse, to take reasonable precautions and to use reasonable care in maintaining a bridge forming part of their railway, which was used for hauling coal and carrying passengers, and that on the 17th August, 1898, a locomotive engine and several cars then being run along said railway and across said bridge, owing to the rotten state of the timbers of the bridge, were precipitated into the valley underneath, thereby causing the death of certain persons.

The defendants were found guilty and a fine of \$5,000 was inflicted by WALKEM, J., at the trial.

Held, per MCCOLL, C.J., and MARTIN, J., on appeal, affirming the conviction, that such an indictment will lie against a corporation under s. 252 of the Code.

Per DRAKE and IRVING, JJ.: Such an indictment will not lie against a corporation.

Secs. 191, 192, 213, 252, 639 and 713 of the Code considered.

A corporation cannot be indicted for manslaughter.

Per MCCOLL, C.J.: The words "grievous bodily injury" in section 252 have no technical meaning, and in their natural sense include injuries resulting in death.

Per DRAKE, J.: The indictment charges the Company with the death of certain persons owing to the Company's neglect of duty and is a charge of manslaughter, the punishment for which is a term of imprisonment for life, and because a corporation cannot suffer imprisonment, therefore the punishment laid down in the Code is not applicable to such a body. When death ensues the offence is no longer "grievous bodily injury," but culpable homicide.

H. A. Maclean, D.A.G., for the Crown. *Duff and Luxton*, for the Company.

Book Reviews.

The Division Court Act of the Province of Ontario with the General Rules and Forms. Second edition, by JAMES BICKNELL, Barrister-at-Law and EDWIN E. SEAGER: Canada Law Book Co., Publishers, 32 Toronto St., Toronto, 1900.

It is scarcely necessary to enlarge upon the value of this work to practitioners and officers of Division Courts. The first edition is so largely in use that its value is known to all.

We are glad to notice that the editors, besides reprinting the Rules by themselves, have weaved them into the text, which is a much more convenient arrangement than the former one, so that the whole law now appears in one convenient volume. One would scarcely suppose that it would take some 800 closely printed pages to give all information that might reasonably be expected in reference to these Courts, but the fact is the editors have not been content with merely giving Division Court law and practice proper, but have branched out in various ways so as to give practitioners ready access to matters which are incidentally of value to those engaged in the practice of these Courts, and which could not be otherwise obtained except by reference to numerous expensive and often unobtainable volumes. The result of this is that there is in the book before us much of law and practice which is very valuable to the practitioner in reference to County Courts and High Court suits. There are for example helpful notes on such matters as prohibition, substitutional service, adding and changing parties, setting aside judgments, the Statute of Limitations, witnesses and evidence and commission connected therewith, interest on money under Dominion and Provincial statutes, proceedings by and against executors and administrators,

attachment of debts, absconding debtors, interpleader, proceedings under executions, etc.

The rules and forms appear in an appendix, together with a large number of additional forms concluding with the boundaries of Division Courts and other statutory provisions relating to these Courts, the whole having a full index of over 70 pages. The work of the printer and publisher has been done in first class style, the selection and arrangement of type and the marginal references being excellent.

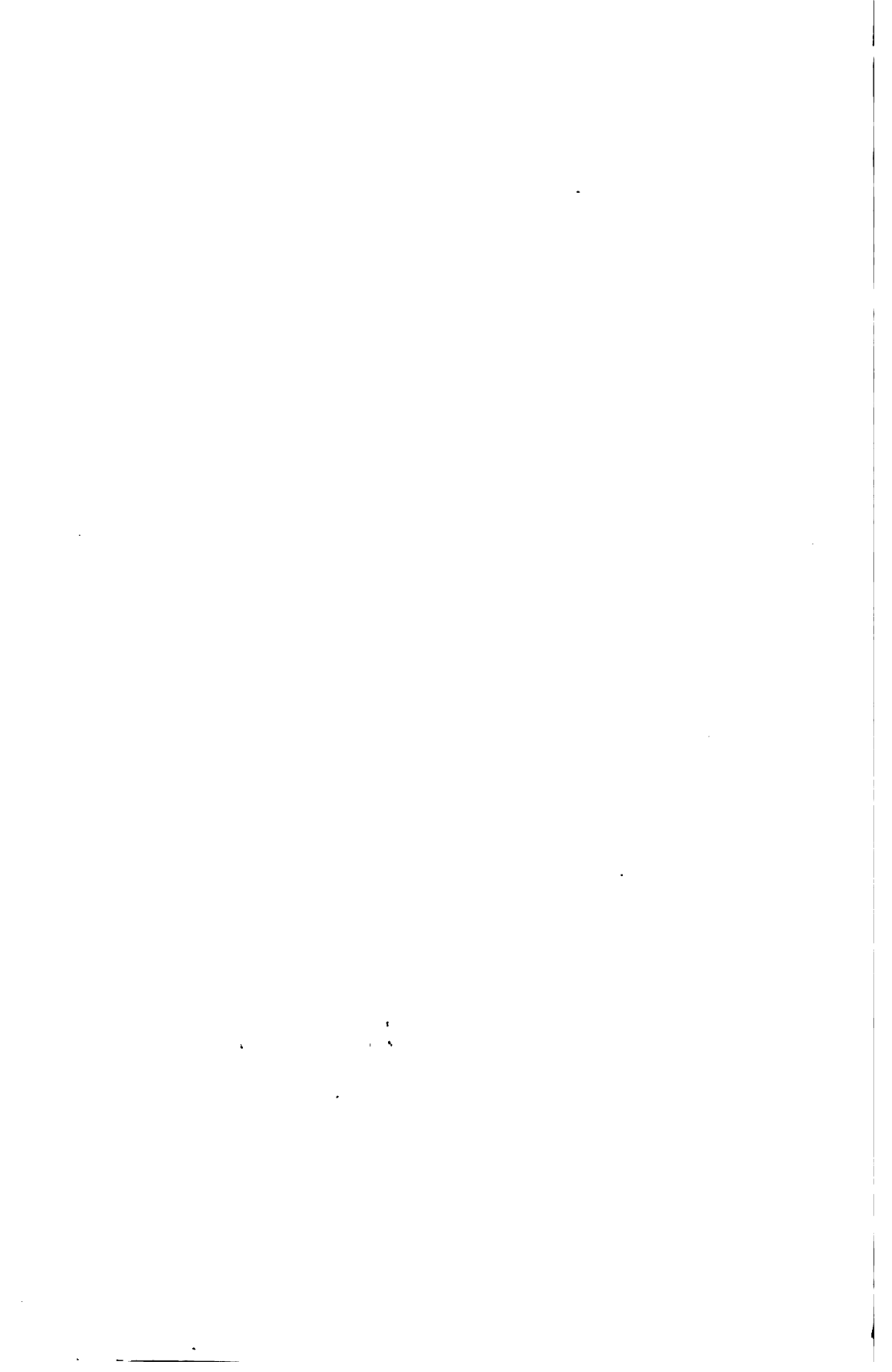
Flotsam and Jetsam.

UNITED STATES DECISIONS.

Master and servant—Fellow servants—Incompetent servant.—The master is liable for an injury to a servant by the negligence of a fellow-servant where he had, before the injury, upon a complaint as to the incompetency of the negligent servant, promised the injured servant to put in his place a competent workman, provided such a time had not elapsed after the promise as to preclude all reasonable expectation that it would be kept. — *Brown v. Levy, Central L. J., 468.*

Death by wrongful Act—Foreign statute—Action by administrator or parent.—We find two recent interesting cases on the subject of death by wrongful act. In *Mattherson v. Kansas City, Ft. S. & M. Ry. Co.*, 60 Pac. Rep. 747, the Supreme Court of Kansas holds that the Missouri statute giving a right of recovery for death caused by the neglect or wrong of another is so far penal in its nature, and so dissimilar in its provisions from the Kansas Statute authorizing a recovery for death by wrongful act, that it is not enforceable in the Courts of Kansas.

The Supreme Court of Arkansas decides, in *St. L., I. M. & S. Ry. Co. v. Dawson*, that a right of action for negligence resulting in death survives to the personal representative of deceased, if she lived after the act constituting the cause of action, though she never became conscious; that a verdict of \$4,000 in an action by an administrator for pain and suffering borne by deceased cannot stand the interval of conscious suffering, if any, between the injury and death being only for a moment; that a parent whose negligence contributed to the death of his young child cannot recover therefor for his own benefit; and that whether a parent's negligence contributed to the death of his child, 6 years old, whom he allowed to go visiting, when he knew that she would have to pass the railroad tracks where she was killed,—the train being overdue, so that it might be there at any moment, and she being unattended and not specially cautioned,—is a question for the jury—*Central L. J., 480.*



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NOS. 17-18.

E. L. NEWCOMBE, Q.C.

Edmund Leslie Newcombe, Q.C., M.A., LL.B., Deputy Minister of Justice, was born at Cornwallis, King's County, N.S., 17th February, 1859; graduated in arts at Dalhousie College in 1878, from which University he also received the degree of M.A. three years later. He studied law at Kentville, in the office of John P. Chipman, Q.C. (now Judge of the County Court for District No. 4), reading at the same time for the law course of the University of Halifax, where he graduated with distinction in 1882.

Called to the Bar of Nova Scotia in 1883, Mr. Newcombe entered into partnership with Mr. Chipman, and during the three years which he practised in Kentville, held briefs in all the important litigation of the county, and also in some cases at the adjoining circuits. He thus earned a reputation which made his services sought at the capital, and so in 1886 he removed to Halifax, and entered into partnership with Nicholas H. Meagher, Q.C., now the Hon. Mr. Justice Meagher, of the Supreme Court of Nova Scotia. Mr. Newcombe practised at Halifax for upwards of seven years, during which he held a leading place at the Bar, and in that capacity appeared in many of the most important cases of the period. An examination of the reports shows that he met with a high measure of success, the result of great industry and skill in the management of his cases and the ability which he exhibits in eliminating the immaterial circumstances and grasping the turning-point of a case, and presenting his side of it in a clear and convincing manner. His clients had the utmost confidence in him.

When in 1893 Mr. Sedgewick was appointed Judge of the Supreme Court, Sir John Thompson at once recognized in Mr. Newcombe qualifications which he considered would prove of great service in the administration of the Department of Justice, and he, preferring the broader field of professional work which was offered, though at some pecuniary sacrifice, arising out of the



E. L. NEWCOMBE, Q.C.,
DEPUTY MINISTER OF JUSTICE FOR CANADA.

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inadequacy of salary as compared with the more generous income which he had been receiving from his practice, relinquished the latter and accepted the appointment of Deputy Minister of Justice for Canada, which position he still occupies. In that capacity he has been engaged not only, as his predecessors were, in the administration of the affairs of his department, which include the advising of other departments of the Government upon legal matters, reporting upon the constitutionality of the statutes of the various Provinces, and many other matters of public importance, but he has in addition, to a considerable extent and with much success, conducted in the courts the litigation in which the Government has been concerned. Mr. Newcombe is eminently fair and judicial in his methods, and his administration of the department has met with general satisfaction.

Mr. Newcombe was appointed Queen's Counsel 18th November, 1893, and called to the Bar of Ontario, 8th December, 1893. He has been a member of the Council of the Nova Scotia Barristers' Society 1892-3; Governor of Dalhousie College, 1887-93; President of Alumni Association of Dalhousie College, 1887; Lecturer on Insurance in the Law Faculty of that University, 1892 and 1893. In 1895 he was appointed by His Excellency in Council representative of the Government of Canada to confer with Her Majesty's Government on the subject of Canadian copyright, and in that capacity visited London and conferred with the Secretary of State for the Colonies, both as to the constitutional aspects of the question, and for the purpose of removing the causes of complaint then existing on the part of the Canadian publishers. Mr. Newcombe's report as to the result of this conference has not been published. His work was mentioned in the Governor General's speech at the opening of the following session of Parliament, and it is believed, although no new copyright legislation has been enacted, that the more satisfactory relations that have since prevailed between Canada and the Mother Country, with regard to this difficult problem, have been very largely due to the capable and prudent manner in which he executed the important mission with which he was entrusted.

Mr. Newcombe is very fond of sport, his special hobby being big game shooting, in which he has a very considerable record for the opportunities afforded by a busy professional life.

So far, no appointment has been made to fill the vacancy caused by the retirement of Chief Justice Burton and the promotion of Chief Justice Armour and Mr. Justice Falconbridge. One rumour has it that a learned Judge is to go from the Court of Appeal to the Queen's Bench Division, his place being taken by a gentleman better known in political than in legal circles. We understand that the present Government claims to be a strong one, and, if so, an evidence of its strength would be to appoint the very best obtainable man at the Bar apart from politics. It has been remarked that in all countries where there is a free Government such as ours, when one of the political parties has been in opposition for many years, and then comes into power, there is always a large army of political adherents seeking office, and the pressure for some position becomes a serious menace to the public service. There is nothing new in this, and it applies to all political parties; but it is sincerely to be hoped that the appointment now to be made will be one which will reflect credit on the Government of the day, and not one which would be the result of political exigency. If any Government makes the Bench a haven of refuge for worn-out politicians, the hitherto usual high character of judicial appointments will sink through the level of mediocrity to that of incompetence. Judges ought to be looked for amongst the vigorous leaders of the profession. With one or two exceptions, Sir John Macdonald acted on this principle, so far as the Bench was concerned, though his appointments to the position of Queen's Counsel were, as a whole, anything but creditable. Again, whilst we do not believe in the fad of placing young men, as such, on the Bench, to appoint those who are subject to any infirmity or who are too far advanced in life, and especially if they are politicians rather than lawyers, is a grave mistake, and we are confident that we voice the thought of the profession when we protest against the Bench being made a dumping ground for useless political timber by any political party. There may be no danger of this at the present juncture, but as there is an ever-present dread in that direction owing to the fact that in this country party politics run high, and because we live beside a people of the same race as ourselves where the judiciary is elective, and therefore directly subject to political influence, we feel justified in calling attention to this most important matter at a time when we can

peak with greater freedom, no appointment having as yet been announced.

Concurrently with the hot wave that passed over Ontario last month, and which was said to have produced the hottest days that have been known for half a century, was the arrival of one of our English exchanges which speaks of the tropical weather in London in the middle of July which resulted in the appearance of two Judges on the Bench without their wigs, an event which was chronicled as both novel and noteworthy. In connection with this it was noted that the judicial headgear was dispensed with by Sir J. P. Wilde on July 24, 1868, when it was remarked in the *Times* that during two days the learned Judge and the Bar sat without their wigs. On the same occasion Sir Richard Collier in opening a case referred to the innovation, and himself apologized for not appearing in full forensic costume, expressing the wish that the precedent set by his lordship might be generally followed, and hoping that "the obsolete institution of the wig was coming to an end." The insular mind, however, revolves slowly, so, with the above exception, both Bench and Bar still swelter under "horse hair." We are glad to notice, however, that the "beaver" as a "tile" is now occasionally varied by a straw hat even by London swells at afternoon teas. But anything is possible when British soldiers are allowed to go into battle, not shoulder to shoulder as of yore, and as a great red target for the enemy, but as individual sharp-shooters clothed in dust-coloured khaki, with the privilege of exercising such common sense as has not been drilled out of them. We have, therefore, every reason to hope, if the hot weather and the war last long enough, that it may dawn upon the average Englishman that he does not know everything, and that it is possible and desirable for him to learn something from other people.

A case on the subject of bicycle law recently came before the Supreme Judicial Court of Massachusetts in *Reg. v. Inhabitants of Danvers*. It was there held that a bicycle is not a carriage within the meaning of a statute which provides that highways shall be kept in repair so that they may be reasonably safe and convenient for travellers with horses, teams and carriages. The plaintiff was

injured by being thrown from his bicycle because of a depression in the highway, and he sought to recover damages from the municipality. He succeeded before the trial judge, but this judgment was set aside by the Supreme Court. The *Albany Law Journal* takes the same view as the Court, remarking as follows: "It would seem, therefore, that while for certain purposes the bicycle may be considered a vehicle, and is to be governed by the statutes and ordinances pertaining to vehicles generally, it is not to be so regarded in contemplation of a statute requiring roads and highways to be kept in safe condition for the passage of vehicles. We entirely agree with the Court that it would be an intolerable burden to compel all highways to be kept in condition for the safe passage over them at all times of bicycles, and that the general construction of cycle paths is a convincing proof that they are not so regarded."

On the question of corroboration in prosecutions for rape a recent case tried before Wright, J., at the Lincoln Assizes in England is of interest. In a letter said to have been written by the girl to her mother immediately after the alleged crime an account was said to have been given of what had happened. The judge did not allow the letter to be read, although he did not say that in strict law it was inadmissible. In this he followed the ruling in *Reg. v. Ingrej*, 64 J.P. 106. The general rule in such cases is laid down in *Reg. v. Lillyman* (1896), 1 Q.B. 167. The *Solicitors' Journal* thus comments upon the subject: "These cases shew what difficulty the judges have in applying the principle of *Reg. v. Lillyman*. Of course the letter itself, or any complaint made by the woman, cannot be evidence of the facts therein alleged. The complaint can only be evidence to shew that the conduct of the woman was consistent with her story in the witness-box, negating her consent to what was done. This is clearly laid down in the judgment of the Court for Crown Cases Reserved. Now, it is notorious that many charges of assaults on women and girls are unfounded, and no jury will convict a man without some fairly strong corroboration. Can a complaint be any corroboration? It may be, if made at the earliest possible opportunity, when the woman is still fresh from the outrage and has had no time to recover from the immediate effects of the alleged violence. Except under such circumstances, however, to admit the terms of

a complaint is to put a premium on trumped-up charges. Nothing (it is submitted) could be more³ dangerous than to admit a letter under almost any circumstances. The writing of a letter must be a deliberate and considered act, and this element of deliberation ought alone to be sufficient to exclude the latter. Where no complaint is made immediately after the assault (as was the case in both the recent cases referred to), the writing of a letter containing a detailed account of the alleged crime will probably seem to most persons more consistent with an imaginary assault or a fabricated charge than with a true story. Anyhow, it must always be most dangerous to allow a letter of this sort to be read by a jury, for it is impossible to secure that a jury shall give to it only its proper weight."

We notice the following sentence contained in the July number of *The Law Quarterly Review* in a review of Beal's *Law of Bailments*:—"It is a novelty to find Canadian cases attached. To English lawyers they may sometimes be useful, and they will no doubt add greatly to the value of the work in Canada. As they are all added in foot notes apart from the English cases and kept out of the text altogether, even the most insular of English lawyers has only to disregard them." It might be quite in order to criticize the above extract somewhat sharply; but we are quite sure that there was no intention on the part of the writer to say anything offensive. The peculiarity, however, of a certain type of Englishmen is that they seem unable, when speaking of any country outside the "tight little island," not to say something which leaves an unpleasant sensation of being "sat upon." The reviewer would probably be quite unable to see the implied sneer in the above quotation, and is doubtless serenely unconscious of what would be palpable in that respect to anyone else—and for the simple reason, that the class to which he belongs goes through life in a curiously constructed atmosphere, which whilst blinding them to their own egotistical arrogance and general ignorance of all matters outside their own island, at the same time throws a bright light on peculiarities which either irritate those whose skins are not as thick as their own, or else amuses those of us who know that they really cannot help it, and that after all they are not such bad fellows when you come to know them.

LORD RUSSELL OF KILLOWEN

One of England's greatest judges and one of the best known men of recent days has passed off the scene. Lord Chief Justice Russell died after a short illness on the 10th ulto. An obituary notice, giving the principal incidents in his life, appears in another place.

The *Times* introduces an interesting sketch of his life and career by saying "A great judge, the foremost advocate of his time and a striking figure in English society, has disappeared from among us with startling suddenness." As an advocate, as a judge and as a citizen he had a personality all his own. In his capacity as an advocate he had many marked characteristics. In the examination of hostile witnesses it is said that he has had no equal in the present century, with possibly the exception of Lord Brampton, better known as Sir Henry Hawkins. This power was recognized as one of the chief factors of his success at the Bar, and may best be illustrated by his demolition of the evidence of Pigott in the Parnell Commission. Another feature was the character of his addresses. Eloquent he certainly was, though he did not depend upon eloquence, but rather upon a careful and masterly marshalling of his facts and a clear, logical and forcible presentation of them. In his address before the Parnell Commission, (Sir James Hannen presiding), which was said to be equal to some of the greatest efforts of Erskine, both characteristics were brought out. And we may here recall the incident that Sir James Hannen at the close of this address wrote to Sir Charles on a slip of paper, "A great speech worthy of a great occasion." Though gifted with unsurpassed quickness of comprehension, he relied mainly on hard work and an indefatigable study of details, whilst at the same time he plunged into every case entrusted to him with unexcelled earnestness and vigor. But after all it was his industrious preparation of his cases more than his eloquence, his nervous energy and his splendid physique that brought him success. Combined with all this was a tremendous power of concentration which enabled him to give to his clients the best that was in him, and he never spared himself.

As to his judicial qualifications he had a rare power of getting at truth with an unequalled thoroughness in the investigation of

complicated facts, and he possessed an amplitude of grasp and unflinching good sense. There may have been lawyers with more profound knowledge of our jurisprudence, such as Jessel, Bowen, Bramwell, Selborne or Watson, and there have been lawyers of note also who were philanthropists and leaders of men in other and sometimes higher spheres, such as Lord Cairns, but of Lord Russell, holding as he did the greatest purely judicial office in Great Britain, it has been said "In the combination of qualities which command the respect of the profession and also exact the interest of the public at large he has had no equal in our time."

He was a great man as well as a great advocate and judge. Although masterful and at times domineering, he was always generous and ready to ask pardon for any breach of courtesy or kindness, and on the Bench his natural impulsiveness and impatience were under great control.

An Irishman through and through, he never faltered in his love and devotion to his native land, and was an outspoken champion of his race. This came out very forcibly in the greatest rhetorical effort of his life, The Parnell Commission, where his sympathies went hand in hand with his brief.

Lord Russell was a Roman Catholic, his family being devoted adherents of that Church, and he was the first of that faith who occupied the high position of Chief Justice of England since the accession of William III.

His intense love of the truth and a hatred of imposters was very marked, and this was the case in matters both great and small. An amusing instance of this may be here referred to. A jurymen once asked him to be excused on the ground of infirmity, explaining that he was deaf and could not hear the evidence. "You can go" replied the Chief Justice in a whisper. The unwary jurymen, forgetting for the moment his assumed deafness, said, "Thank you, my Lord," when the Chief Justice concluded his sentence in a loud and peremptory tone—"into the box and do your duty."

He was a keen sportsman, especially devoted to the turf, and well known also in dramatic circles, but never allowing these things to interfere with his work or his official duties.

The profession in Canada have a special interest in the late Chief Justice by reason of his visit to this country in 1896, and also by reason of the leader of the Canadian Bar, Mr. Christopher

Robinson, having been associated with him on behalf of England and Canada in the Behring Sea Arbitration.

We conclude with another quotation from the *Times*—"With one voice the Bench and Bar of England to-day will say of the late Chief Justice he had noble instincts; he maintained the traditions of English justice, and loved the best in public and private life."

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act.)

PROBATE—ADMINISTRATION WITH WILL ANNEXED—NEXT OF KIN OUT OF JURISDICTION—ASSETS, AND SOME BENEFICIARIES, WITHIN JURISDICTION—GRANT TO STRANGER WITHOUT CITING NEXT OF KIN.

In The Goods of Moffatt (1900) P. 152. In this case application was made for the grant of administration with the will annexed without citing the next of kin, who were resident abroad. The will was made by the testatrix, domiciled in Hayti. There was no appointment of executors, but the will contained the words, "M. E. Bordu, of Port-au-Prince, and Mr. J. B. Wallace, of Liverpool, will carry out my last wishes." The only estate in England consisted of the sum of £1260 7s. 11d. in the hands of Mr. Wallace's firm. The sole next of kin, who was entitled to one-half of this fund, lived in Hayti, and had not been cited. The beneficiaries of the other half were in England and assented to Mr. Wallace being appointed administrator with the will annexed. Jeune, P., granted the application, as best carrying out the terms of the will.

ADMINISTRATION DE BONIS NON—REVOCATION OF GRANT ON DISAPPEARANCE OF ADMINISTRATOR—FRESH GRANT.

In The Goods of Loveday (1900) P. 154, a grant of administration had been made to the widow of a deceased intestate in 1885. She had since disappeared and could not be found upon due inquiry, and an application was now made by one of the next of kin to revoke the former grant, and to make a new grant de bonis non to the applicant. Jeune, P., granted the application, though admitting he was going a little beyond any decided case in doing so.

**PASSENGER TRAVELLING ON FREE PASS—LOSS OF LIFE AND PROPERTY BY
PASSENGER TRAVELLING ON FREE PASS—CONDITIONS OF FREE PASS—LORD
CAMPBELL'S ACT (9 & 10 VICT., c. 93)—(R.S.O. c. 135).**

The Stella (1900) P. 161, was an application in the Admiralty Court made by a widow on behalf of herself and children to recover out of a fund paid into court by the owners of a steamship which had been wrecked, compensation for the loss of her husband, and also for the loss of certain property in consequence of the negligence of the owners of the steamer or their servants. The facts were that the husband was a railway official and had obtained from another railway company a free pass for himself and wife from London to Jersey, the pass being subject to a condition printed on the back, "That it shall be taken as evidence of an agreement that the company are relieved from the responsibility for any injury, delay, loss or damage, however caused, that may be sustained by the person or persons using this pass." Part of the journey had to be made in a steamer, which, owing to the negligence of the servants of the railway company, was stranded, and the husband was drowned and his own and also his wife's luggage was lost. Barnes, J., on appeal from the registrar of the court, held that the claim for compensation could not be sustained, that in respect of the loss of life, the widow and children could only claim under Lord Campbell's Act (R.S.O. c. 135), where, if death had not ensued, the deceased would have been entitled to maintain an action, and that the condition on the pass was a bar to any such action which applied as well to the sea passage as to the land transit; and that the condition on the pass also precluded any claim for damages either as administratrix for the loss of her husband's luggage, or individually for the loss of her own property.

**COMPANY—DECEASED SHAREHOLDERS—NOTICE WHERE SHAREHOLDER IS DEAD
—REGISTERED ADDRESS—FORFEITURE OF SHARES.**

In *Allen v. Gold Reefs* (1900) 1 Ch. 656, the Court of Appeal (Lindley, M.R., and Williams, and Romer, L.JJ.,) have reversed the decision of Kekewich, J., (1899) 2 Ch 40 (noted ante vol. 35, p. 678). The case when before him was disposed of on the ground that the proceedings taken to forfeit the shares of a deceased shareholder were invalid for want of due notice, the notice of the meeting having been sent to the registered address of the deceased, and not to his personal representatives. The articles of association provided that

notice of general meetings was to be given to "members" and that such notice might be served upon any member personally or by post addressed to "such member" at his registered address. The Court of Appeal held that in the case of a deceased member it was not necessary either to send a notice addressed to him at his registered address, or to serve his legal personal representatives unless they have themselves become "members" by formal registration, and on the merits of the case the Court of Appeal came to the conclusion that the shares in question had been validly forfeited.

COMPANY—DIRECTOR, ACTION AGAINST—DIRECTORS' LIABILITY ACT, 1890, (53, 54 VICT., c. 64) s. 3—(R.S.O. c. 216, s. 4)—3, 4 W. 4 c. 42, s. 3—(R.S.O. c. 72, s. 1 (g)).

In *Thomson v. Clanmorris* (1900) 1 Ch. 718, the Court of Appeal (Lindley, M.R., and Rigby, and Williams, L.JJ.) have affirmed the decision of Kekewich, J., (1899) 2 Ch. 523 (noted ante p. 20). The action was brought against a director of a company to recover damages for loss occasioned by misrepresentation in a prospectus, and the Court of Appeal agreed that the action was not one for penalties, and was consequently not governed by 3 & 4 W. 4, c. 42, s. 3—(R.S.O. 72, s. 1 (g)) but was governed by the statute 21 Jac. 1, c. 16: and the Court of Appeal intimated that the cause of action arises when the shares are subscribed for, and the action must be commenced within 6 years from that date; and not from the issue of the prospectus in question. 3 & 4 W. 4, c. 42, s. 3, from which R.S.O. c. 72, s. 1 (g), is taken, is held to apply only to "penal actions."

POWER OF APPOINTMENT—APPOINTMENT OF FUND—ACCRETIONS TO FUND, PASSING UNDER APPOINTMENT.

In re Cruddas, Cruddas v. Smith (1900) 1 Ch. 730. In this case the effect of an appointment made under a power is discussed. A lady under her father's will had a power of appointment over a sum of £30,000 invested in trustees, in which she had also a life interest. The daughter by her will reciting verbatim the gift and power, in exercise thereof appointed the said sum of £30,000 "together with the interest and annual proceeds thereof, by the said will of my father to be held in trust for me, my children and grandchildren, and over which I have such power of appointment as

aforesaid" in various specified sums in favour of her children and in trust as to another sum of £6,000, which was described as "the residue of the said sum of £30,000" for another child. On her death the securities in which the £30,000 had been invested were worth £39,000, and Kekewich, J., held that as to the £9,000 there was no valid appointment, and that it passed as upon default of appointment. The Court of Appeal (Lindley, M.R., and Rigby, and Williams, L.JJ.) on the other hand, were of the opinion that the testatrix was dealing with the fund as an invested fund, and that the whole of it was appointed in the proportions indicated by her will, and the decision of Kekewich, J., was therefore reversed.

**COMPANY—DIRECTOR—FIDUCIARY CHARACTER—CONTRACTS WITH COMPANY—
COLLATERAL PROFITS MADE BY DIRECTOR.**

Costa Rica Ry. Co. v. Forwood (1900) 1 Ch. 756, was an action brought by the plaintiffs to recover profits made by a director out of a contract entered into by the company with another company of which the director was also a director. The articles of association of the plaintiff company provided that a director should vacate his office if he was concerned in, or participated in, the profits of any contract with the company without declaring the nature of his interest, but no director should vacate his office by reason of his being a member of any corporation, company or partnership which has entered into contract or done work for the company; or by reason of his being interested either in his individual capacity or as a member of any company, corporation, or partnership in any adventure or undertaking in which the company also have an interest; but the director was not to vote on contracts of this kind, and if he did his vote was not to be counted. The plaintiff company, of which Forwood was a director, entered into contracts with a steamship company for the carriage of bananas. Forwood was the largest shareholder in the steamship company, and was also a partner in the firm which managed it. No disclosure was made of Forwood's interest in the steamship company, either in the prospectus of the plaintiff company, or when the contracts were entered into. Profits were made by the steamship company out of the contracts with the plaintiffs in which Forwood participated. Forwood having died the action was brought against his representatives to make them account to the plaintiffs for these profits. Byrne, J., who tried the case, although of the opinion that on the

ordinary principles of equity, apart from the articles of association, the plaintiff company would be entitled to recover the profits made by Forwood on the contracts with the steamship company, yet considered that the articles of association prevented the application of those principles, and that as the articles provided that a director should not vacate his office by reason of being interested as a member of a company in any adventure or undertaking in which the plaintiff company might also have an interest, he was of opinion the case was brought within the decision of Lord Hatherley in *Imperial Mercantile Credit Association v. Coleman*, L.R. 6 Ch. 558, and the plaintiffs were therefore not entitled to recover, and he dismissed the action.

WILL—CONSTRUCTION—“DIE WITHOUT CHILD OR CHILDREN”—EXECUTORY GIFT OVER.

In re Booth, Pickard v. Booth (1900) 1 Ch. 768, Byrne, J., was called on in this case to construe a will of a testator whereby he devised one-half of his estate absolutely to the plaintiff, “but should she die without child or children” then over among the defendants. The plaintiff contended that the words “die without child or children” meant “die without ever having had a child or children,” and that as she had now a child she was absolutely entitled. Byrne, J., however, agreed with the defendants that the words meant “without child or children living at her death,” and he made a declaratory judgment declaring that the plaintiff is now absolutely entitled to one half of the estate in question subject to an executory gift over in favour of the defendants in the event of the plaintiff not having any child who should survive her or attain 21 in her lifetime. Why the latter clause was added is not stated; it seems to create an ambiguity in the declaration.

MORTGAGE—MORTGAGE OF POLICY OF LIFE INSURANCE—COVENANT—PAYMENT TO MORTGAGEE BY INSURANCE COMPANY—REAL PROPERTY LIMITATION ACT, 1874, (37 & 38 VICT., c. 57) s. 8—(R.S.O. c. 133, s. 23).

In re Clifden, Annaly v. Agar—Ellis (1900) 1 Ch. 774 decides, per Byrne, J., an important point on the law of mortgages. In 1871 the defendant's testator executed a mortgage of certain reversionary interests, and also of a policy of life insurance. The mortgage contained the usual covenants for payment of principal and interest, with power of sale and surrender of the policy. The

mortgagor never made any payment of principal or interest. In 1893 the mortgagee surrendered the policy and received from the insurers £1468 14s. The mortgagor had no notice of the surrender. The mortgagee died in 1895, and the mortgagor in 1899. The question presented for decision was whether the representatives of the mortgagee were entitled to enforce the covenant in the mortgage against the representatives of the mortgagor, and the case turned on whether or not the payment of the surrender value of the policy in 1893 was a payment within the meaning of the Real Property Limitation Act, s. 8, (R.S.O. c. 133, s. 23). Byrne, J. decided that it was not and that the remedy on the covenant was barred. We may observe that in Ontario this section has been held not to apply to actions on the covenant for payment contained in a mortgage, but is held to apply only to actions to enforce the mortgage against the land itself: see *Allan McTavish*, 2 Ont. App. 278; *Boice v. O'Lorane*, 3 Ont. App. 167. In the circumstances of the present case the payment of the surrender value of the policy would probably be held not to keep alive the remedy on the covenant beyond 20 years, under R.S.O. c. 72: see *Ib.* s. 8. Byrne, J., succinctly sums up the result of the case thus: "It appears to me that when the statute has once run, and the twelve years have elapsed, the realization of the property by the mortgagee after that date does not amount to and cannot be construed as a payment by the mortgagor or his agent, or by some person entitled by virtue of the contract to make a tender of the money to a person bound to accept it," which seems to apply both to payments under R.S.O. c. 133, s. 23, and R.S.O. c. 72, s. 8.

COSTS — DEBENTURE HOLDERS' ACTION.

In re Queen's Hotel (1900) 1 Ch. 792, decides, per Cozens-Hardy, J., that the action of a debenture holder of a company to realize his security, though it enures to the benefit of other debenture holders, is on the same footing as to costs as an ordinary mortgage action for foreclosure or sale, and that the plaintiff is not entitled to costs as between solicitor and client as against the other debenture holders who come in and get the benefit of the action, but only to party and party costs.

WILL—CONSTRUCTION — “ELDEST SON ENTITLED TO POSSESSION” — SALE BY ELDEST SON.

In *Shuttleworth v. Murray* (1900) 1 Ch. 795, the construction of a will was in question. By the will successive life estates in Blackacre were limited to the members of a class, other than and except an eldest or only son for the time being entitled to the possession or receipt of the rents of Whiteacre as tenant for life or a greater estate. A tenant in tail in remainder of Whiteacre joined with his father, who was tenant for life, in a sale of Whiteacre, of which he had the benefit, and the question was whether the son who had thus sold his interest in Whiteacre was nevertheless still to be regarded as coming within the exception in the will. Cozens-Hardy, J., held that on the death of his father he became the eldest son within the meaning of the will and incapable of succeeding to a life estate in Blackacre: in the opinion of the learned judge the son in question having joined in the disentailing deed, under which he took benefits, must be treated as having had and enjoyed the estate.

WILL—MORTGAGEE IN POSSESSION—DEMISE OF MORTGAGED PROPERTY—MORTGAGE DEBT IMPLIEDLY BEQUEATHED.

In *re Carter, Dodds v. Pearson* (1900) 1 Ch. 801, the short point decided by Cozens-Hardy, J., was that where a mortgagee in possession of the mortgaged property specifically devised the mortgaged premises in fee simple, the devisee was also entitled to the mortgage debt.

COMPANY—MEMORANDUM OF ASSOCIATION—STOCK SUBSCRIBED FOR BY ARTICLES OF ASSOCIATION—DOUBLE ALLOTMENT—COMPANIES' ACT, 1867 (30 & 31 VICT., c. 131) s. 25—(R.S.C. c. 119, ss. 5, 27—R.S.O. c. 191, s. 10).

In *re Whitehead* (1900) 1 Ch. 804, was an application by the representatives of a deceased shareholder in a joint stock company to compel the company to register a memorandum of a contract to take shares as fully paid up, and that it might be declared that such memorandum shall operate as a sufficient contract within the meaning of the Companies' Act, 1867, s. 25 (see R.S.C. c. 119, s. 27). The facts were, that the company was formed in 1870 for the purpose of acquiring a woolen mill from one Whitehead, and by agreement, recited in the articles between the company and Whitehead, it was agreed that the purchase money for the mill should be paid for by the issue of 1068 fully paid shares to Whitehead.

Whitehead signed the articles of association and agreed to accept 1068 shares, and the question now arose whether his estate was not liable to have these shares treated as not fully paid up, by reason of the fact that no contract had been filed previously to the issue of the shares. The difficulty was occasioned by the decision in *Dalton Time Lock Co. v. Dalton*, 66 L.T. 704, to the effect that the issue of the certificate of incorporation operated as an allotment of the shares subscribed for in the memorandum of association. Cozens-Hardy, J., made the order asked for, prefacing the order with a recital that the 1068 shares referred to in the agreement were those for which he subscribed the memorandum of association.

POWER—JOINT DONEES—CONVEYANCE BY ONE DONEE AND PERSONS ENTITLED IN DEFAULT—CONCURRENCE OF OTHER DONEE—NO REFERENCE TO POWER—IMPLIED RELEASE.

In *Foakes v. Jackson* (1900) 1 Ch. 807, a husband and wife had a joint power of appointment over certain property, and subject thereto, the survivor had a separate power of appointment over the same property in favour of certain objects. The husband and wife and the persons entitled in default of appointment executed a deed whereby the wife (with her husband's concurrence) and those persons according to their several and respective estates and interests as beneficial owners, assigned the property to an object. The joint power was not referred to in this deed. The wife died, and the husband then executed a deed purporting to appoint the property in favour of other persons. Farwell, J., however, held that this latter appointment was inoperative, and that if the deed of assignment executed by the wife, with the husband's concurrence, did not operate as a joint appointment, which he was inclined to think was the case, it nevertheless operated as a release of the husband's separate power, following *Re Hancock* (1896) 2 Ch. 173, 183 (noted ante vol. 32, p. 619).

EVIDENCE—STATUS AND BOUNDARIES OF FOREIGN STATE—JUDICIAL COGNIZANCE OF STATUS OF FOREIGN STATE.

In *Foster v. Globe Venture* (1900) 1 Ch. 811, two of the issues raised were, whether the tribes of Suss were independent, or were subjects of the Sultan of Morocco; and whether a tract of land between the Atlas Mountains and the River Pure was the territory of those tribes, or of the Sultan of Morocco. For the purpose of

determining these questions Farwell, J., held that he was bound to take judicial cognizance of the status and boundaries of foreign states, and if his personal knowledge of the matter was insufficient he was bound to apply to the Secretary of State for Foreign Affairs and that his answer would be conclusive on the parties, a course which he deemed necessary to take in the present case.

**VENDOR AND PURCHASER — COMPENSATION — RESTRICTIVE COVENANTS—
SPECIFIC PERFORMANCE.**

Rudd v. Lascelles (1900) 1 Ch. 815, was a purchaser's action for specific performance of a contract for the sale of land, with compensation on the ground of undisclosed restrictive covenants affecting the property. There was no provision in the contract for compensation for defects. The covenants in question related to building and user of the premises. The plaintiff claimed that these covenants depreciated the value of the property £1000, and he stated that he had lost a sale at an advance of £1000 solely on the ground of the restrictive covenants. Farwell, J., was of opinion that the jurisdiction to enforce specific performance with compensation in cases where there is no provision in the contract regarding compensation rests on the equitable estoppel referred to in *Mortlock v. Buller*, 10 Ves. 292, 315, viz., that a vendor representing and contracting to sell an estate as his own cannot afterwards be heard to say he has not the entirety. In the present case there was no representation beyond the mere offer to sell, and the purchaser knew that the vendor was ignorant as to his title, so that Farwell, J., considered that there was no such representation as would raise an equitable estoppel. To enforce the contract with compensation he considered would not be proper, because of the difficulty of assessing compensation, and because it would be virtually imposing a new contract on the parties, and that the plaintiff's own statement that he had lost a sale at £1000 advance would seem to indicate that the price he had agreed to pay was the proper value of the property, subject to the restrictive covenants. He therefore dismissed the action with costs.

COMPANY—SHARE CERTIFICATE—ESTOPPEL—DIRECTOR, DUTY OF.

In *Dixon v. Kennaway* (1900) 1 Ch. 833, the plaintiff sued a joint stock company and the chairman of its board of directors, claiming a declaration that the plaintiff was entitled to 30 shares,

numbered 115 to 144, and to the dividends accrued thereon since 31st Dec., 1893, or to damages. The plaintiff purchased the shares in question in 1897 from a broker named Riddell, who was also secretary of the company, and paid him the purchase money therefor. She subsequently received, accepted, and returned to Riddell a transfer of 30 shares, not specifying the numbers, executed by Pitman, a clerk of Riddell's, who did not own any shares, and was a man of straw. Pitman received no consideration for the transfer, which he executed by Riddell's direction. The transfer was placed before the board of directors, and the board without requiring the production of Pitman's certificate passed the transfer, ordered it to be registered, and a new certificate issued, and at the same meeting a new certificate was issued under the seal of the company, signed by two directors and countersigned by the secretary, in accordance with the articles, wherein it was certified that the plaintiff was the owner of 30 shares, numbered 115 to 144 inclusive. The chairman, who presided at the meeting, did not sign the certificate, and did not notice that the shares therein specified formed part of his own holding, as was the fact. The certificate was subsequently handed over to the plaintiff and dividends paid to her, and also to the chairman in respect of the shares, Riddell concealing the fraud by paying a corresponding amount into the dividend account. He was subsequently dismissed, and notice was given to the plaintiff by the company that the certificate was invalid, and declining to recognize her as a shareholder. There were consequently two points in the case, the first as to the right of the plaintiff against the chairman, and secondly, as to her rights against the company. As to the chairman the plaintiff contended that he was estopped from denying her title to the shares mentioned in the certificate on the ground that he had presided at the board meeting at which the certificate was passed, but Farwell, J., held that the chairman was not bound by the certificate signed by the other two directors, nor estopped from disputing its validity as against himself; but he held that the certificate having been accepted and received by the plaintiff and relied on by her, was binding on the company and they were estopped from disputing it, and as the shares in question belonged to someone else they were liable in damages for the full value of the shares, and for which he gave judgment in favour of the plaintiff.

PATENT—UTILITY.

Welsbach Incandescent Light Co. v. New Incandescent Lighting Co. (1900) 1 Ch. 843, was an action to restrain the infringement of the plaintiff's patent. The defendant, besides denying the alleged infringement, pleaded that the defendant's patent was not useful. The patent in question was granted in respect of the application of thorium in the manufacture of mantles for gas lights. It was claimed that this material used alone gave greater rigidity to the mantles, and when mixed with other ingredients gave them greater flexibility than had been obtained by any methods previously in use. Buckley, J., who tried the action, held that a very small amount of utility is sufficient to support a patent and that in this case the suggestion to the public of this rare earth as a means to an end, and giving a useful choice of another substance to be used in making the mantles, was sufficient evidence of utility and he therefore overruled this defence.

INSURANCE—REPUDIATION BY ASSURER OF LIABILITY—ACTION FOR DECLARATION OF LIABILITY.

Honour v. Equitable Life Assurance Society (1900) 1 Ch. 852, was a somewhat unusual action. One Powis had effected a policy of insurance on his own life with the defendant company, which he had assigned to the plaintiff. After two premiums had been paid the defendants refused to receive any further premium and repudiated any liability on the policy. The plaintiff commenced the action in the lifetime of Powis, and claimed a declaration that the policy was valid and binding on the defendants, and for an injunction to restrain them from repudiating it. The defendants contended that the action would not lie, and that until the death of Powis the Court should make no declaration as to whether the policy was valid or not, and they contended that the plaintiff's only remedy was to bring an action for damages. Buckley, J., who tried the case, although agreeing that the action could not be maintained, thought that the plaintiff ought not to be prejudiced by the defendants' refusal to accept the premiums, and he therefore, as a condition of dismissing the action, required an undertaking from the defendants that in case an action should thereafter be brought on the policy the defendants would not rely on the non-payment of premiums as a defence. Subsequently, on the plaintiff submitting to be examined as a witness, the objection to the form of the action was withdrawn and the case heard on its

merits, with the result that the policy was held to have been obtained by fraud, and was ordered to be delivered up to be cancelled.

COSTS—TAXATION AT INSTANCE OF CESTUI QUI TRUST—BILL PAID BY TRUSTEES MORE THAN 12 MONTHS—SOLICITORS' ACT, 1843 (6 & 7 VICT., C. 73) SS. 37-41—(R.S.O. c. 174, ss. 45, 49).

In re Wellborne (1900) 1 Ch. 857, was an application by a cestui que trust to tax a solicitor's bill which had been paid by the trustees more than twelve months previous to the application. It was contended by the solicitor that s. 41 of the Solicitors Act, 1893 (R.S.O. c. 174, s. 49) applied and that there could be no taxation after the lapse of six months from payment of the bill. Kekewich, J., however, held that s. 41 does not apply to applications for taxation by a cestui que trust. It may be noted that R.S.O. c. 174, although authorizing an application to be made for taxation in certain cases by third parties liable to pay or who have paid a bill of costs, does not expressly include the case of a cestui que trust, although applications by a cestui que trust appear to have been entertained in *Sandford v. Porter*, 16 Ont. App. 565, and *Re Skinner*, 13 P.R. 276.

COMPANY—PROMOTERS OF COMPANY—SECRET PROFIT BY PROMOTERS.

Glucksperie v. Barnes (1900) A.C. 24C, was known in the court below as *In re Olympia* (1898) 2 Ch. 153, (noted ante vol. 34, p. 724). The proceeding was one in a winding-up matter to compel the promoters of the company in liquidation to pay over to the liquidator for the company secret profits made by the promoters. The facts were as follows: A syndicate was formed to buy and resell to a company to be formed a place of entertainment called Olympia. Four members of the syndicate of whom Gluckstein was one, also agreed to become directors of the proposed company, which was to be formed for the purpose of buying Olympia from the syndicate. Olympia was purchased by the syndicate for £140,000. There were certain charges outstanding against Olympia which the syndicate also purchased, so as to yield a profit of £20,000. The company was duly formed and in the prospectus it was stated that Olympia had been purchased by the syndicate for £140,000, and was to be sold to the company for £180,000, and the only reference made to the purchase of the charges was as

follows: "Any other profits made by the syndicate from interim investments are excluded from the sale to the company." It was the share of the four members of the syndicate, who were also directors, in the £20,000 made by the syndicate from the purchase of the charges against Olympia, that the liquidator now sought to recover. The Court of Appeal decided the application in favour of the liquidator, and the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten and Robertson) have now affirmed that decision. Lord Macnaghten was of opinion, however, that the Court of Appeal had not gone far enough, and that the four directors ought to have been required to make good the whole £20,000, and that instead of being charged with 3 per cent. interest it was a case for penal interest. Only one of the directors appealed and he asked that the liquidator should be ordered to proceed against his co-directors before calling on him to make good the whole amount which the directors had received, but Lord Macnaghten remarked that he did not think it a case in which indulgence should be shown to the appellant, that he might or might not be able to recover contributions from those "who joined him in defrauding the company." He goes on to say: "He can bring an action at law if he likes. If he hesitates to take that course, or takes it and fails, then his only remedy lies in an appeal to that sense of honour which is popularly supposed to exist amongst robbers of a humbler type." A pretty severe comment on the transaction truly.

**AGREEMENT FOR LEASE—RIGHT OF WAY—CONSTRUCTION—MUTUAL MISTAKE
IN CONSTRUCTION OF DOCUMENT—CONTEMPORANEOUS INTERPRETATION OF
DOCUMENT.**

The North Eastern Ry. Co. v. Hastings (1900) A.C. 260, is the case known in the court below as *Hastings v. The North Eastern Ry. Co.* (1899) 1 Ch. 656 (noted ante vol. 35, pp. 182, 439). The action was brought to recover rent payable under a lease made in 1854 whereby the plaintiff granted to the defendant a right-of-way through his land for 1000 years, the company paying a specified rent on coal carried over "any part of the railway comprehended in" a bill which afterwards became The Company's Special Act of 1854, and which should be shipped at Port Blyth. For more than forty years rent was paid by the company for coal carried over the railway and shipped at Port Blyth when the coal passed over the

plaintiff's land, but no rent was ever paid or claimed for coal carried over the railways and shipped at Port Blyth but not passing over the plaintiff's land. The House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, Davey and Robertson) unanimously agreed with the Court of Appeal that the agreement was perfectly plain and unambiguous, and the fact that the parties had interpreted the words in a different sense from that which they plainly bore could not affect the construction: that the defendants were liable to pay rent for coal carried over any part of the railway comprehended in the Special Act and shipped at Port Blyth, although it did not pass over the plaintiff's land, and that the plaintiff was entitled to an account for six years prior to the issue of the writ.

TRUST—TRUSTEE—BREACH OF TRUST—NEGLIGENCE—IMMUNITY CLAUSE—
TRUSTEE ACT, 1893 (56 & 57 VICT., C. 53) S. 17, SUB-S. 3—(R.S.O. C. 130.)

Wyman v. Paterson (1900) A.C. 271, although an appeal in a Scotch case, is one that it will be useful to note. The defendants were trustees of a fund set apart to answer a life annuity and devisable on the annuitant's death among the persons entitled in remainder, of whom the appellant was one. The sum of £3700, part of this fund, was invested in a heritable bond. On July 15, 1887, the bond was paid off, and the trustees allowed their law agent to receive the money and retain it in his hands uninvested for six months. At the end of this time the law agent had misappropriated the money, became bankrupt, and the greater part of the fund was lost. It appeared that the agent had deposited the money in a bank for behoof of the trustees, and that they had requested the agent to deposit it in their own names, which the law agent failed to do, the trustees on making enquiries being put off with a statement that he was ill and could not attend to business. On January 19, 1888, they first heard that he was in embarrassed circumstances, and they immediately employed a new agent, and on the same day informed the bank that the old agent had ceased to act for the trustees and was not entitled to withdraw the money, but it appeared that he had withdrawn it on the previous day. The will creating the trust contained the usual immunity clause in favour of the trustees. The case was twice argued before the House of Lords, first before Lord Halsbury, L.C.,

and Lords Macnaghten and Ludlow, and again before Lord Halsbury, L.C., and Lords Macnaghten, Morris, Shand, and Hereford. Their Lordships reversed the decision of the court below which had adjudged the trustees not liable, and held that the trustees had been guilty of a positive breach of trust and were bound to make good the fund, and that the immunity clause in the will afforded them no protection. Lord Morris, however, dissented, and Lord James hesitated and concurred with the majority with regret.

MINING LEASE—NOTICE OF ABANDONMENT OF INTEREST IN LEASE BY JOINT LESSEE.

Palmer v. Moore (1900) A.C. 293, is an appeal from the Supreme Court of New South Wales, which declared that one Lamrock, an insolvent, had no beneficial interest in a certain gold mining lease and was merely a trustee for the respondent of his legal interest, if any, and that the appellant, as official assignee, had no interest in the lease and no claim to any part of the purchase money agreed to be paid for it. The facts were that Lamrock and two others were joint lessees of the Crown for the purpose of gold mining. The lessees were called on to shew cause why the lease should not be cancelled for non-performance of the conditions thereof. Before receiving this notice one of the lessees had received a letter from Lamrock saying he was unable to contribute to the expenses of working the mine and that the other lessees could do what they liked with it, "I am out of it." The other lessees succeeded in avoiding the cancellation of the lease, and thereafter found all the money for working the mine, and ultimately sold it for £1200, in which the assignee of Lamrock now claimed to participate. The Judicial Committee of the Privy Council (Lords Hobhouse, Morris and Davey and Sir R. Couch) agreed with the Court below and dismissed the appeal.

PURCHASE BY HUSBAND—IN NAME OF WIFE AND DAUGHTER.

Eddy v. Eddy (1900) A.C. 299, was a curious action instituted by a father against his daughter for the recovery of \$187,000 under the following circumstances. The plaintiff and his deceased wife were married in Vermont in 1846. In 1854 they removed to Hull in the Province of Quebec, where, by their joint efforts, they built up a large business. Two properties were purchased and conveyed to the wife, and another property was purchased and

conveyed to the daughter, the purchase money in each case being paid by the cheques of the plaintiff. The wife died and devised the properties thus conveyed to her to her daughter, and the plaintiff now claimed to be a creditor of his daughter, and of his deceased wife's estate, in respect of the purchase money of all three properties, and also for other sums subsequently advanced by him for their improvement. Some questions arose in the case touching the Quebec law as to gifts by husband and wife, and as to whether the husband, claiming to have advanced money for his wife, could bring an action of this kind without first rendering an account of rents and profits received by him, as, until he had done so, it would be possible that he might have been recouped his alleged advances; but the judgment of the Judicial Committee of the Privy Council largely turns upon the fact that the actions of the plaintiff himself were inconsistent with the claim he now sets up. In 1873 he had conveyed what purported to be all his estate for the benefit of his creditors, but did not include in the property so assigned the alleged debts due by his wife and daughter. In 1876 he became insolvent and sent in upon oath a statement of assets and liabilities, and though he entered his wife as a creditor, he did not enter among his assets the alleged debts due by her, or his daughter, and these omissions were not explained, and the only evidence of the alleged debts was the fact that the plaintiff had given his own cheques for the sums claimed, but this fact their Lordships considered was consistent with the fact that the plaintiff was advancing money in his hands belonging to his wife. The judgment of the Court below dismissing the action was therefore affirmed.

TELEPHONE WIRES — ILLEGALLY STRETCHING WIRES ACROSS A STREET—
REMOVAL OF WIRES.

National Telephone Co. v. Constables of St. Peter Port (1900) A.C. 317, was an appeal from the Royal Court of Guernsey. The action was brought by a telephone company against municipal officers for removing the plaintiffs' telephone wires, which were stretched across a public street without obtaining the defendants' permission, and contrary to their prohibition. The Judicial Committee (the Lord Chancellor and Lords Macnaghten, Morris, Shand, Davey, Brampton, and Robertson) being of opinion that the plaintiffs' had failed to make out any statutory right to stretch their wires across, could not succeed in the action, even though it

was not made out that the respondents had any legal power to prohibit the plaintiffs from stretching the wires. In short, their Lordships think that an action would not lie for the mere removal of the appellants' goods from a public place in which they had no right to place them. The dismissal of the action was therefore held to be right.

SUCCESSION DUTIES—COVENANT TO PAY—CONSTRUCTION—“WITH INTENT TO EVADE PAYMENT OF DUTY.”

Suris v. Registrar of Probates (1900) A.C. 323, was a South Australian case, in which a question under a Succession Duty Act arose. A deceased person in his lifetime covenanted to pay £200,000 to his children with interest at $1\frac{1}{2}$ per cent. per annum, the debt being payable at call. He regularly thereafter paid the interest, but paid no part of the principal. On his decease a claim was made on behalf of the Crown against the covenantees for payment of double succession duties in respect of the £200,000 on the ground that the covenant was made “with intent to evade payment of duty” under the Act. The Court below had given judgment in favour of the Crown, but the Judicial Committee of the Privy Council (the Lord Chancellor, and Lords Hobhouse, Macnaghten, Morris, Davey and Robertson) reversed the decision, holding that, in the absence of evidence to the contrary, the covenant conferred on the children complete ownership of the debt, and was a non-testamentary disposition of property within the meaning of the South Australian Succession Duties Act, and not subject to duty under that Act, as the testator died more than three months thereafter; also that in the absence of evidence of some device or contrivance for that purpose, the covenant could not be deemed to have been made “with intent to evade the payment of duty” under the Act.

The Forum.

A CAUSERIE OF THE LAW.

CONDUCTED BY CHARLES MORSE.

Graduation in arts at Oxford University is no longer a *sine qua non* in respect of the degree of B.C.L. therefrom. Now the holder of an arts degree from some recognized university other than Oxford is entitled to supplicate for the degree of Bachelor of Civil Law, provided he pursues the prescribed law course at Oxford, and passes the examinations. This lesion of the old policy of Oxford law degrees for Oxford arts men only is said to be due to that militant reformer, Professor A. V. Dicey.

* * * The death of Lord Russell, of Killowen, Lord Chief Justice of England, recalls his visit to America in 1896, when he delivered his great address on International Law, before the American Bar Association. Lord Russell enunciated many wise and noble sayings on that occasion, but nothing finer than the following passage from his peroration :

"What, indeed, is true civilization? By its fruit you shall know it. It is not dominion, wealth, material luxury ; nay, not even a great Literature, and Education wide spread—good though these things be. Civilization is not a veneer ; it must penetrate to the very heart and core of societies of men. Its true signs are thought for the poor and suffering, chivalrous regard and respect for women, the frank recognition of human brotherhood, irrespective of race, or color, or nation, or religion, the narrowing of the domain of mere force as a governing factor in the world, the love of ordered freedom, abhorrence of what is mean, and cruel, and vile, ceaseless devotion to the claims of justice. Civilization in that, its true, its highest sense, must make for peace."

An echo of Lord Russell's plea for international arbitration, which was the real burden of this address, was heard at the recent banquet given by the Bench and Bar of England, in the Middle Temple Hall, to representatives of the Bench and Bar of America.

* * * Lord Russell did not long survive his warm friend the late Mr. Lockwood, Q.C., who accompanied him on his visit to America. When "rare Frank Lockwood" died there was sorrow as sincere felt by the Bar in this country, as that which marks the demise of the more eminent of the two well-known men.

* * * Poor Mr. Augustine Birrell, lawyer and litterateur, what a time of it he has to be sure between legal admirers, who are too kind in their praise of his divagations in letters, and literary railleurs who are ever diligent to disparage them. Of the latter sort must be classed the editor of *Literature*. In the issue of that journal of July 21, the head-master of Blackheath school is ridiculed for referring to Mr. Birrell as "a modern Macaulay." And this is how the editor argues the point: "This comparison is surely inept. As well might Charles Lamb be bracketed with Gibbon, or any literary light-weight with any other literary heavy-weight. There might be excuse for pointing out some similarities between Lamb and Mr. Birrell. But between Macaulay, the complete exponent of machine made English, and Mr. Birrell, with his genial whimsies and irresponsible somersaults, are not the differences too wide and deep to need emphasis? The head-master was doubtless led away by the occasion. Mr. Birrell's 'Obiter Dicta,' was one of his prize volumes, and so, no doubt, was Macaulay's 'Lays,' perhaps the 'Essays,' and as Macaulay's books and Mr. Birrell's looked much alike in red and gilt with mottled edges, the head-master was moved to his Gilbertian jest." Why may not Mr. Birrell be persuaded that Law is to-day, as she was in the time of Sir William Blackstone, a jealous jade—a Casaubon and a Mansfield at one and the same time? C'est impossible.

* * * There is no doubt that the failure of the Belgian authorities to adequately punish the infamous Sipido had its effect in stimulating the assassin of King Humbert to perpetrate his foul crime. It is all very well to bespeak some international measures for the suppression of anarchy, as Lord Salisbury is now doing, and we trust that a convention of the powers may be had for this purpose in the near future; but we believe that in every country in Europe there exists at the present day legal machinery of a domestic kind quite sufficient to cope with this pestiferous propaganda, if such machinery were properly operated. We often read in the professional press of the contempt foreign jurists entertain for the English law as compared with the salutariness and exactness of their own. Conceding that the criticism is just, how often do we hear in England of political murders? Clearly anarchy does not thrive in England. We think it was Guizot who said

that England had the worst system of criminal law in the world at his day, but that, on the other hand, it was the best administered. And he was right.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Que.] PARSONS *v.* HART. [June 12.

*Shipping—Bill of lading — Ship's agent—Mandate — Customs of port—
Delivery—Carriers.*

A trade custom, in order to be binding upon the public generally, must be shewn to be known to all persons whose interests it would be to have a knowledge of its existence, and, in any case, the terms of a bill of lading, inconsistent with and repugnant to the custom of a port, must prevail against the custom.

Judgment appealed from reversed, the Chief Justice dissenting. *Atwater*, Q.C., and *Duclos* for appellant. *Macmaster*, Q.C., and *F. S. MacLennan*, Q.C., for respondent.

Que.] BRIGHAM *v.* BANQUE JACQUES CARTIER. [June 12.

Insolvency—Compromise—Secret agreement—Bribery.

A commercial firm having made an abandonment of its property for the benefit of its creditors under the provisions of the Code of Civil Procedure, a secret arrangement was made whereby a particular creditor, without any legal right to preference or priority, was secured an advantage over the other creditors, through the assistance of one of the inspectors of the insolvent estate to whom was promised a sum of money for his personal use upon his advising the acceptance of proposal for the purchase of the estate upon a composition at a rate on the dollar to be paid to the creditors of the estate generally. The preferred creditor was, under the concealed arrangement, to receive an amount greater than the rate of the composition proposed, such additional sum to be paid by a third person who took no direct interest in the estate purchased.

Held, that the agreement was fraudulent and void ; that the proposed payment by the third person was as much a fraud upon the general body of

the creditors as if it had been promised by the insolvent firm itself, and that the additional sum could not be recovered by the creditor so preferred.

Held also, that the promise of the payment to the inspector was a bribe and, for that reason alone, the transaction to induce which it was given should be adjudged corrupt, fraudulent and void.

Judgment of the Court of Review, at Montreal, reversed.

Aylen, Q.C., for appellant. *Foran*, Q.C., and *Lajoie*, for respondent.

Que.]

DINGWALL *v.* McBEAN.

[June 12.

Mandate—Partnership—Agency—Factor—Pledge—Lien—Notice—Right of action—Intervention—Res judicata—Arts. 1739, 1740, 1742, 1975 C.C.

A partner entrusted with possession of goods of his firm for the purpose of sale may, either as partner in the business or as factor for the firm, pledge them for advances made to him personally, and the lien of the pledgee will remain as valid as if the security had been given by the absolute owner of the goods, notwithstanding notice that the contract was with an agent only.

Where a consignment of goods has been sold and they remain no longer in specie, the only recourse by a person who claims an interest therein is by an ordinary action for debt, and he cannot claim any lien upon the goods themselves nor on the price received for them.

The plea of *res judicata* is good against a party who has been in any way represented in a former suit deciding the same matter in controversy.

Leet, Q.C. for appellant. *Greenshields*, Q.C., and *Dickson*, for respondent.

Province of Ontario.

HIGH COURT OF JUSTICE.

Ferguson, J.]

LYLES *v.* WINDSOR FAIR GROUNDS.

[July 2, 1898.

Contract—Use of race track—Lease or license—Construction of document—Nature of possession—Forfeiture.

An agreement under seal made between the defendants, an incorporated association, of the first part, and the plaintiff and another, of the second part, dated the 4th March, 1897, recited that the latter was desirous of obtaining so much of the grounds and track of the association as might be necessary for the purpose of conducting race meetings during the season of 1897, for the days and times hereinafter mentioned, and had agreed to pay therefor \$2,000.00 and a quarter of the net profits of such venture for such use, subject to the terms and conditions thereinafter mentioned. The agreement then provided:—

(1). That the parties of the second part should have the permission

to use the race track and so much of the said grounds, barns and buildings of the association as might be necessary for the purpose of holding race meetings commencing on the 1st May, 1897, and thence up to the 1st of November, 1897, subject to the terms and conditions thereafter mentioned, upon payment of \$2,000.00, etc., and that the parties of the second part should provide and keep proper books of account and employ a book-keeper first approved of by the association, whose duty it would be to make all necessary and proper entries in the books of all transactions which would relate to or be incidental to the said race meetings, and to which books the association should have access, and that a balance sheet should be prepared, etc., and the parties of the second part should pay to the association one quarter of the net profits or proceeds of such race meetings and of all matters incidental thereto, in addition to the money rental of \$2,000.00.

(2). That the race meetings should be conducted in a manner specified and set out.

(3). That the race meetings should not be held at certain times.

(4). That the betting privileges should be let in a manner specified and set out.

(5). That the parties of the second part should, at their expense, keep a nightwatchman on the premises for the safety of the buildings, and should observe and conform to all the requirements of the insurance companies having risks thereon.

(6). That if additional barns or other improvements were required by the parties of the second part, they should provide the same at their own expense, but under the directions of the association, whose property such barns or improvements should be and remain.

(7). That the number of races per day should be as specified.

(8). That the parties of the second part should keep in repair the track, grounds, buildings, fences, and all other equipments and property of the association and deliver the same back in as good shape and repair as when taken, and the president and directors of the association should at all times have access to the track, grounds and buildings to view state of repair, or for any purpose whatever, and the parties of the second part should repair and otherwise comply with and observe the requirements of this agreement as might be required of them, and the shareholders should be allowed free entry to race meetings.

(9). That the president and directors of the association should have free access as aforesaid, and might require performance and observance of all the covenants, terms and conditions of the agreement, and the parties of the second part should immediately comply with such requests as aforesaid, and in case of non-performance or non-observance or in case of any breach or violation of the terms and conditions of this agreement in any respect, it should become null and void and of no effect, and the association should be entitled to resume possession, and, if necessary, to

enforce *delivery of such possession under the Act respecting overholding tenants*, and the then current *rental* should immediately become due and payable.

(10). That in case the parties of the second part should, without the consent of the association, cease racing or neglect to continue their race meetings, for the space of fifteen days, save for the purposes hereinbefore mentioned, they should cease to have any rights under this agreement, and, unless they give notice of such abandonment, they should be liable to pay at the rate of \$30.00 per day for every day of such abandonment without notice, and the association might resume possession at any time after such notice or after the expiration of such period of fifteen days.

(11). That this agreement should not interfere with or affect the rights and privileges of the lessee of the club house and premises and other things mentioned in his lease.

(12). That this agreement or the rights thereunder should not be sold, transferred, assigned or sublet without the consent, first had, of the association, in writing.

During the currency of the period the association, by a resolution of of their board of directors, at a meeting held in accordance with their by-laws, declared the agreement void and at an end, and served upon the plaintiffs a notice stating that the plaintiff and the other party of the second part had violated the agreement in certain ways and manners, specified and set out, and that the association had resumed possession of the track and of the lands and premises in connection therewith, and had declared the agreement null and void.

Held, that the agreement was not a lease, but a mere license, and the relationship of landlord and tenant did not exist between the contracting parties.

The granting part was free from ambiguity in respect of the character and quantity of the interest that was intended to pass by it; it is the proper office of this part of the deed to denote what the premises or things are that are granted, and it is the place where the intent of the grantor and what he has actually done in that respect is more particularly to be looked for; recourse must be had to the proper and efficient part of the deed to see whether the grantor has actually granted what it is urged that his expressions denote that he supposed he had granted, for the question properly is not what he supposed he had done, but what he really has done by his grant. There was nothing in the granting part of this document shewing a grant of the exclusive right of entry or the exclusive right of possession during the period indicated. The privilege of using for certain defined purposes was what and all that was granted by these words, and this fell short of what is necessary to constitute a lease.

Even if the granting words were considered ambiguous, there was nothing in the other parts of the document of sufficient force and clearness

to enlarge or explain the meaning of the granting words in such a manner as to shew that the document was a lease.

The provisions in regard to a nightwatchman, to additional barns or improvements, and to keeping the track, grounds, buildings, fences and equipments in repair and delivering them up in as good shape and repair as when taken, were all reconcilable with the view that the document was a license only, and not a lease; and, besides, there was a provision for access and entry at all times and for any purpose whatever.

The provision in the forfeiture clause that, in the event of a breach, the association should be entitled to resume possession only meant that the association should have the right to resume such possession as the grantees should have, which clearly was not an exclusive possession. The words, "and, if necessary, to enforce delivery of such possession under the Act respecting overholding tenants," could not, taken alone, have the effect of stamping the character of a lease upon the instrument. These words merely pointed to a supposed ready method of getting from the grantees such possession as at the time they might have.

Held, also, upon the evidence, that there was a breach of the contract, and that the contract was in law properly forfeited and declared void by the defendants.

Watson, Q.C., for plaintiff. *Riddell*, Q.C., for defendants.

Robertson, J.] RE MCCARTEE AND TOWNSHIP OF MULMUR. [June 8.

Liquor License Act—Local option by-law—Omission to nominate deputy-returning officers in—Defect—Quashing.

When a by-law requires the vote of the electors, the deputy-returning officers to take their votes should be named in the by-law; and a by-law passed under s. 141 of the Liquor License Act R.S.O. (1897) c. 245, from which their names were omitted, was quashed, even although deputy-returning officers were subsequently appointed by a general by-law.

Haverson, for the motion. *G. M. Vance*, contra.

Meredith, C.J.] ONTARIO BANK v. ROUTHIER. [June 20.

Banks and banking—Deposit—Right to set off—Ranking on estate for balance—Deficiency of assets.

A testator having a deposit to his credit in a bank at the time of his death was a debtor to the bank on a note, under discount which had not then matured. After its maturity the bank brought an action on the note against his executors in which it was contended, assets of the testator being insufficient to pay his debts in full, that the bank should rank on his estate for the amount of the note and give credit on the dividend received for the deposit.

Held, that the deposit having been withdrawn or demanded before

the maturity of the note the bank was entitled to set off the debt on the note against the deposit and rank for the balance.

William Wyld and Glyn Osler, for plaintiffs. Belcourt, Q.C., and J. A. Ritchie, for defendant.

Province of Manitoba.

QUEEN'S BENCH.

Full Court]. PARENT *v.* BOURBONNIERE. [July 12.

Vendor and purchaser—Sale of land—Rescission of agreement by sale to third party.

The plaintiff's claim was for payment of an instalment of the purchase money overdue on an agreement of sale of a hotel property to defendant which provided that, upon default in payment, the plaintiff might put an end to the contract by notice in writing.

After the due date of the instalment defendant notified plaintiff that she would not carry out her contract and, about twenty days later, the plaintiff, without giving defendant any notice, entered into a binding agreement of sale of the property to a third party. He then brought this action.

Held, that the plaintiff had practically rescinded the contract of sale to defendant and could not thereafter sue upon it. Appeal from the Judge of the County Court of Emerson allowed with costs.

Forrester, for plaintiff. *Ewart*, for defendant.

Obituary.

LORD RUSSELL OF KILLOWEN.

Lord Russell of Killowen, Lord Chief Justice of England, whose death has created a profound feeling of grief throughout the whole country, died suddenly on the 10th inst., at his residence in Cromwell Houses, South Kensington.

Charles Russell was born in November, 1832, at Newry, and spent his early boyhood at Killowen, a little hamlet between the Killowen Mountains and the shores of Carlingford Bay. His father was Mr. Arthur Russell, of Seafeld House, Killowen, who, though a devout Roman Catholic, was held in high esteem by the Protestant Ulstermen

of his day; while his uncle was Dr. Russell, president of Maynooth College, to whom Cardinal Newman refers so affectionately in his 'Apologia.' He received his early education at a private school at Newry, and afterwards went to St. Malachy's College in Belfast and to St. Vincent's College at Castleknock, near Dublin. His name was entered as a student at Trinity College, Dublin, but he never proceeded to a degree there. Like Lord Truro, Lord Field, and the late Mr. Justice Manisty, the Lord Chief Justice started his career in the legal profession as a solicitor. It was in the latter town that Charles Russell began his brief career as an Irish solicitor. He was articled to Messrs. Hamill & Denver, a Newry firm of solicitors, and completed his articles with Messrs. Alexander & O'Rorke, a Belfast firm. His friends, who were impressed by the oratorical powers he displayed, advised him early to give his talents a wider field, and accordingly he crossed the Channel and became a student at Lincoln's Inn, where he was called to the Bar in 1859. Joining the Northern Circuit, he settled in Liverpool for a time, and speedily acquired a practice in the Court of Passage and other Lancashire Courts. He wrote a small book on the practice of the Court of Passage—the only work which he ever published, with the exception of the letters on the Irish land question he contributed to the *Daily Telegraph*, which he republished in volume form. Starting from Liverpool his practice soon extended all over the Circuit. A story is told that the late Lord Herschell, Lord Russell, and the present Speaker, dining together and bewailing their bad luck, resolved to seek their fortunes in the colonies. This incident must have occurred early in Mr. Russell's career, for his period of brieflessness was comparatively short. During his early days in London he acted as a reporter in the gallery of the House of Commons, but it was not long before the claims of his profession engaged the whole of his energy. While Russell was still a young forensic hand he argued a case before Lord Westbury, who gave the young advocate some advice which appeared to exercise a great influence upon him. Speaking some years ago of the secret of his methods, Lord Russell narrated the incident in these words: 'If you ask me to reduce the common habit of my life to a formula, I will tell you that I have only four ways of preparing my work. First, to do one thing at a time, whether it is reading a brief or eating oysters, concentrating what faculties I am endowed with upon whatever I am doing at the moment; secondly, when dealing with complicated facts, to arrange the narrative of events in the order of dates—a simple rule not always acted upon, but which enables you to unravel the most complicated story, and to see the relation of one set of facts to other facts. My third rule is never to trouble about authorities or case-law supposed to bear upon a particular question until I have accurately and definitely ascertained the precise facts. The last rule is one which the professional man will appreciate better, perhaps, than the layman. It is not only valuable

—I may say this as I did not invent it—but very interesting to me individually, as I got it from Lord Westbury when a young hand at the Bar and pleading before him. I was plunging into citation of cases, when he very good-naturedly pulled me up and said : “Mr. Russell, don’t trouble yourself with authorities until we have ascertained with precision the facts, and then we shall probably find that a number of authorities which seem to bear some relation to the question have really nothing important to do with it.” My fourth rule is to try to apply judicial faculty to your own case in order to determine what are its strong and weak points, and in order to settle in your own mind what is the real turning-point in the case. This method enables you to discard irrelevant topics and to mass your strength on the point on which the case hinges.’

Thirteen years after joining the Bar—a period more notably brief in those days than at the present time—Russell took silk. This important step, which he took in 1872, created some misgiving among his friends. Baron Martin, in a letter written some years later to Lord Selborne, confessed that he had misjudged the young barrister’s powers, but that events had shown how wisely he had acted. He was fortunate in the circumstances that attended his early career as a leader. Coleridge and Hawkins and several other leading advocates were giving their whole time to the Tichborne case. But Russell, with his rare combination of forensic gifts, must have achieved with rapidity a foremost place in the profession, even if his career as a Q.C. had been commenced under less favorable conditions. Few men have brought a richer store of gifts to forensic work. He possessed a broad knowledge of legal principles, a firm and ready grasp of essential facts, and a wide acquaintance with the world ; he was gifted with an eloquent tongue, a pleasant voice, and a handsome presence ; he was a man of remarkable tact, of dauntless courage, and boundless industry. To mention the cases in which he appeared in the heyday of his success would be to write a list of all the causes celebres from the seventies to the nineties. Among the more celebrated were the convent case of *Saurin v. Starr*, the Belt case, the Dilke divorce case, the Colin Campbell case, Miss Fortescue’s breach of promise case, the famous Baccarat case, the great ‘Pearl’ case, the Maybrick murder trial, the Marks and Butterfield case, and the Hansard Union trial. His practice was by no means, however, confined to mere *Nisi Prius* advocacy. But the most notable of his triumphs was achieved before the Parnell Commission in 1889. He appeared, with Sir R. T. Reid, the late Sir Frank Lockwood, and Mr. Asquith, for Mr. Parnell, to rebut the serious accusations of the *Times*. The six days’ speech he delivered on this occasion was the most brilliant effort of his lifetime, and will probably rank among the finest orations ever delivered at the Bar. ‘I have spoken,’ he said at the close of this memorable speech, ‘not merely as an advocate—I have spoken for the land of my birth ; but I feel, I profoundly feel, that I have been speaking, too, for and in the

best interests of England—of the country where very many years of my laborious life have been passed, and where I have received a kindness, a consideration, and a regard which I should be glad to be able to repay.' These words must have been recalled by many on Tuesday, when representatives of every class of English life assembled in the Brompton Oratory and at his graveside at Epsom to do honour to his memory.

As became an Irishman with strong and earnest convictions and with conspicuous ability to express them, Charles Russell took an active part in politics quite early in his career at the Bar. He stood for Dundalk in the Liberal interest in 1865, and again in 1874, but was defeated at both elections. In 1880, however, he defeated his antagonist, and, as an independent supporter of Mr. Gladstone's Irish policy, soon obtained a recognized place as a debater in the House of Commons, though never at any period of his long Parliamentary career did he achieve any success in the House at all comparable to his reputation in the Courts. Two years after he entered the House of Commons—in the middle of 1882—he was offered the puisne judgeship made vacant by the promotion of Bowen to the Court of Appeal. This was not the first occasion on which a judicial post had been offered him. While he was a junior he received from Lord Westbury the offer of a County Court judgeship. His refusal of both these offers shows that Lord Russell had at two different stages of his career a keen appreciation of his powers. At the general election in 1885 he was returned for South Hackney against the present Mr. Justice Darling, and he continued to represent this constituency until his promotion to judicial office. He threw himself with characteristic vigour into the Home Rule agitation, and became Attorney-General in Mr. Gladstone's short lived Ministry in 1886. It was while the succeeding government of Lord Salisbury was in office that he made his chief reputation as a politician. His speech in the House of Commons on the report of the Parnell Commission was a masterly performance which received the full admiration of Mr. Gladstone and his supporters; but it was mainly as a platform speaker that he became an eminent figure in his party. He spoke in all parts of the country at Home Rule meetings. No place seemed too remote or too small—he travelled from London after a busy day in the Courts, and spent the evening in exercising his fervid oratory in a heated hall; and there can be little doubt but that the strain which his enthusiasm thus placed upon his physical strength did something to undermine even his fine constitution. On the return of the Liberal party to power in 1892 he resumed the office of Attorney-General. He objected to the new condition of exclusion from private practice, and informed his constituents that only his personal loyalty to Mr. Gladstone had induced him to resume the position on such terms. The most notable event of his second tenure of office as first Law Officer of the Crown was his appearance before the Behring Sea Commission in Paris in 1893, when, with Sir Richard

Webster, he represented the interests of Great Britain. In recognition of the valuable services he rendered the country at this memorable inquiry he was made a G.C.M.G. Mr. Gladstone more than once introduced into the House of Commons a bill for the purpose of making Roman Catholics eligible for the office of Lord Chancellor. It was satirically described as the Russell Relief Bill—a description based largely upon the pointed reference which Mr. Gladstone made to Sir Charles Russell in introducing the measure. 'It is a great thing, morally as well as socially,' he said, 'for a man to arrive at the head of the Bar.' But the bill was not passed, and the expectation that Sir Charles Russell would become Lord Chancellor was doomed to disappointment.

Not long afterwards—in the early part of 1894—a Lordship of Appeal fell vacant through the death of Lord Bowen, and, much to the surprise of the profession and the public, Sir Charles Russell accepted the office with a life peerage. In the House of Lords he had little opportunity of distinguishing himself, and it may be doubted whether he would ever have made any great mark as a member of that tribunal. A few months later the death of Lord Coleridge made vacant a position for which he was far more qualified, and, amid universal approval, he was appointed Lord Chief Justice of England—the office in which, after little more than six years, he has died. His career on the Bench, though marked by some defects, was worthy of the best traditions of what Sir Edward Clarke called 'the greatest purely judicial office in this country.' He made a most dignified president of the common-law Courts, and the tributes which his colleagues have paid to his memory show clearly how successfully he performed the administrative part of his duties. To all the great qualities he displayed at the Bar he added the judicial spirit when he was promoted to the Bench. The manner in which he presided over the trial at Bar in 1896 of *Regina v. Jameson and others* was, in a peculiar degree, characterized by the best qualities of the English Bench. There were, however, less important occasions on which he appeared to exhibit too great a tendency to bring the arguments of counsel and the evidence of witnesses to a close. He was apt, too, to be impatient with persons less gifted than himself with quickness of apprehension, and to use his giant's strength like a giant. He had, in other words, the defects of his qualities and the qualities of his defects. His failings all bore traces of a strong, manly nature; they never obscured—they did, perhaps, but throw into greater relief—the great and admirable qualities he displayed as a judge. He succeeded the late Lord Herschell as a member of the Venezuelan Commission last year, and achieved as much success as an arbitrator on this tribunal as he had formerly won as an advocate before the Behring Sea Commission. The thoughtful and eloquent address on international law he delivered before the Bar Association of America at Saratoga in 1896 earned for him a considerable reputation throughout the world as a student of international questions, which

was strengthened by the successful part he played in connection the Venezuelan Commission. He was president of the Society of Comparative Legislation, and not many weeks before he died received an invitation from M. Saleilles to become a patron of the Congress of International Law.—*English Law Journal*.

Book Reviews.

The Law Quarterly Review. July 1900. London: Stevens & Sons, Limited, Chancery Lane.

This number keeps up the high character of this publication. The notes of cases are in the usual crisp style of the writer, and selected with his usual intuitive knowledge of what would be helpful and interesting to the profession. The leading articles are as follows: The Near Future of Law Reform, dealing principally with a rearrangement of the Courts and especially the vexed question of Appellate Jurisdiction; the Consideration and the Assignment of Choses in Action, which gives the net result of the writer's enquiries into the subject as follows: "Equity does not, and never did, require a consideration for the validity of the assignment of a chose in action; but (a) Voluntary assignees of chose in action may be postponed (at any rate where their titles are not protected by the Judicature Act) to subsequent acquirers with a better claim; and (b) An imperfect assignment of a chose in action will not be completed by the Court at the suit of a volunteer." The Growth and Development of International law in Africa is exhaustive as well as timely. We have then Election between alternative remedies; the Rule in *Hadley v. Baxendale*; *DeNichols v. Curlier*; and the New German Law, and Contempt of Court and the Press.

Flotsam and Jetsam.

UNITED STATES DECISIONS.

Tenancy in common—Sale of logs by co-tenant—Refusal of buyer to receive.—1. One of several tenants in common cannot cut and sell logs from the land without the consent of his co-tenants, so as to divest them of their interest.

2. Where co-tenant attempts to sell logs cut from the land without consent of co-tenant, the buyer may refuse to receive the logs upon the ground that he has not title.—*Nevels v. Kentucky Lumber Co.*, *Central L. J.*, 486.

Damages.—The recovery of damages by a husband for the loss of his wife's services on account of personal injuries is held, in *Selleck v. Janesville* (Wis.) 47 L.R.A. 691, not to be limited to the proved money value of her services as a hired servant, but to include the loss or impairment of his right to conjugal society and assistance.

Bicycle Law.—Bicycles are held, in *Taylor v. Union Traction Co.* (Pa.) 47 L.R.A. 289, not to be within the meaning of an ordinance giving vehicles a right of way upon street-railway tracks in the direction in which the cars usually run over vehicles going in the opposite direction, so as to entitle a bicyclist to the right of way over a vehicle approaching from the opposite direction. With this case is an extensive note on bicycle law.

Contract.—An agreement to furnish crushed stone "in such quantities as may be desired," to be "delivered on street" in a certain city, without making any more definite provision as to the quantity to be furnished, though made with one who has a contract for paving a street in that city, is held, in *Hoffman v. Maffioli* (Wis.) 47 L.R.A. 427, to be insufficient to bind the other party to furnish him at his option all the stone needed for paving such streets, since it does not bind him to take such quantity.

Negligent act—Mental shock.—A recovery for sickness due to the purely internal operation of fright caused by a negligent act is denied in *Smith v. Postal Teleg. Cable Co.* (Mass.) 47 L.R.A. 323, even if the negligence was gross and the party in fault ought to have known that the result would follow his act. But, on the other hand, physical injury resulting from fright or other mental shock caused by wrongful act or omission, is held, in *Gulf, C. & S. F. R. Co. v. Hayter* (Tex.) 47 L.R.A. 325, to be sufficient to sustain a recovery of damages, if the negligence or wrong was the proximate cause of the injury, and the injury ought, in the light of all the circumstances, to have been foreseen as a natural or probable consequence thereof.

The courts of this country appear to be doing their part toward the extirpation of lynching. Recently the Supreme Court of Ohio has affirmed the constitutionality of the act passed some time ago in that State which provided in cases of lynching that a penal remedy might be recovered. The recovery of this remedy by those having an interest in the life of the person lynched, as well as the tax rate authorized and required by the provisions of the act, are held to be within the general powers of the legislature, and not violative of the mandate of equal taxation. Nearly a dozen States of the Union already have passed acts of this character, and in every case in which the question of their constitutionality has come before a court of last resort they have been sustained. It will be remembered that by the common law mob violence can be assessed upon any region which fails to protect life and property, and the laws referred to are but an extension of the same principle.—*Albany Law Journal*.

An English exchange calls attention to the fact that an extraordinary claim of privilege was made recently in County Longford, Ireland, by a parish priest who had been summoned to give evidence as to the handwriting of the prisoner, who was one of his parishoners. He objected to giving evidence on the ground that he was an American citizen and that, therefore, the court had no jurisdiction over him. He said that he had given his allegiance to the American government and had "renounced all allegiance to every foreign prince, potentate and power." While the privilege was what the English exchange refers to as "ridiculously untenable," the prosecutor in this case, who felt the hardship of compelling a clergyman to give evidence against one of his own flock, did not press the matter. An attempt was then made to prove the handwriting of the prisoner by calling his solicitor as a witness, but the latter also pleaded privilege and refused on that ground to give evidence—a contention with which the magistrates agreed. Our English contemporary is doubtful, however, whether they were right. It adds: "There are a great many exceptions to the privilege of communication between a solicitor and his client, and one of them seems to be that a solicitor may be called to prove his client's handwriting, even though he be acquainted with it only from having seen him sign documents in the case." (*Hurd v. Moring*, 1 C. & P. 327.)—*Albany Law Journal*.

According to a recent compilation made by the New York *Herald*, there were from 1848 to 1897 twenty-eight attempts, many of them successful, on the lives of royal personages and rulers. The list follows: Pietro Acciarito tried to kill King Humbert on April 22, 1897. Four attempts were made to assassinate Napoleon I. Queen Victoria's life has been attempted three times. Two efforts were made to kill the Prince of Wales. Napoleon III was frequently shot at but died in bed. The King of Prussia was twice fired at in 1851, but escaped injury. King Victor Emmanuel of Italy narrowly escaped death at an assassin's hands in 1853. King Ferdinand of Naples was stabbed by a soldier in 1856. Queen Isabella of Spain was attacked by Fuentes in 1856. The Queen of Greece, was shot by a student in 1862. Abraham Lincoln, President of the United States, died on April 15, 1865, from a bullet fired by Wilkes Booth the night before. One attempt on the life of the German Emperor in 1873 and another in 1878. King Alfonso of Spain was shot at in 1878. Alexander II of Russia was assassinated on March 13, 1881, in St. Petersburg. Unsuccessful attempts on his life had been made in St. Petersburg in 1866 and in Paris in 1867. President James A. Garfield was shot by Charles J. Guiteau on July 2, 1881, and died on September 19. President Carnot of France was stabbed to death by Caserio Santo in Paris, June 24, 1894. A bomb was thrown at President Faure of France June 13, 1897.—*Albany Law Journal*.



HON. JAMES ROBERT GOWAN, Q.C., C.M.G.,



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SENATOR.*

As the original founder of this journal and its constant friend, as well as for other reasons more apparent to the public, it is appropriate that we should give to our readers the picture of the gentleman whose name is above-mentioned, and refer briefly to his career.

On the occasion of his retirement from the bench in October, 1883, we gave a brief memoir of his life and services up to that time, and we would refer our readers to the journal of that year, pages 301, 339 and 355. Further references to his career will be found in previous volumes of this journal as follows: 1885, p. 65; 1890, pp. 581, 596; 1893, p. 385.

Mr. Gowan was born Dec. 22, 1815, of an old Irish family which has contributed many distinguished men to the service of the Crown in days past. In 1834 he was admitted a student of the law to the Law Society of Upper Canada, and was on the 5th of August, 1839, called to the Bar, practising for a few years in Toronto with the late Hon. James E. Small, Solicitor-General. On Jan. 17, 1843, he was appointed, during the Baldwin-Lafontaine Government, Judge of the then Simcoe District with the unorganized Districts of Muskoka and Parry Sound, and the Islands on lakes Huron and Simcoe opposite thereto, an appointment which proved one of the very best made at the instance of that conscientious and eminent statesman the Hon. Robert Baldwin.

For some forty-two years Mr. Gowan occupied this judicial position to the great advantage of the public, enjoying the esteem and affection of all the members of the profession who practiced before him. No wiser, more worthy, or useful judge, to the extent of his sphere, ever sat on any bench. As appeals from his judgments were almost unknown, and his word law to the people in this district, and as he had the unbounded confidence of the bar it may naturally be supposed that his learning was equal to the other attributes which made the practice of the law in his courts a

pleasure, and which added dignity to and a sense of security in the administration of justice in the courts over which he so long presided. Space fails, however, to refer further to his judicial career, except to say that for many years before and after his retirement from the bench he occupied the position of Chairman of the Board of Judges, and that it was his own wish that prevented, on two occasions, judicial promotion, first to the Court of Common Pleas, and subsequently to the Court of Queen's Bench of this province, during the administration of the Right Hon. Sir John A. Macdonald.

Most of the best work done by Mr. Gowan during his long and useful life was not known to the public until many years elapsed, and much of it has as yet never been made known, though it has proved and will prove a lasting benefit to the country. For example, none but those connected with it knew that for many years this journal in the early years of its existence, was indebted to his learning and industry for articles which were of great service to the profession, to the magistracy and to the officers of the local courts of this province. Few likewise know the extent to which he was the author or framer of some of the most important enactments on our statute book, or that his ripe experience and wise counsel were often sought by others, some high in authority, in important matters of doubt and difficulty. It is however within public knowledge that he was largely engaged in the various revisions and consolidations of the statute law of this province; the statutes of Upper Canada to 23 Vict., the statutes of Canada up to 1859, and the Ontario consolidation of 1877; that he was associated at various times between 1852 and 1871 with judges of the Superior Courts in the framing of rules of procedure, and in the enquiry into various matters affecting the better administration of justice, etc., and that he sat on very important commissions, notably being one of three judges who, in 1873, were appointed by the Crown to investigate certain charges made in Parliament against Cabinet Ministers in connection with the Canadian Pacific Railway contract. We cannot, however, further refer to these matters in detail.

In 1885 the retired judge received Her Majesty's summons to the Senate of Canada, taking his seat in the Upper House on February 3rd of that year, and he then received congratulatory addresses and communications as well from the bar and other public bodies in his county as from various distinguished men

both in Great Britain and Canada, who valued the new senator as a warm personal friend, or who respected him for his many public services. In 1887 he was appointed chairman of the Committee upon Standing Orders and Private Bills, and the next year brought before the House the necessity of some amendment of the law of divorce, resulting in changes, and the adoption of a new procedure, which, under his wise supervision have proved most beneficial and now governs. Here we may interject the observation that it would be well for the country if those in power, to whatever party they may belong, were more able to free themselves from the trammels of party politics and give to the country in the Senate of Canada the services of men of independent views, not hampered or prejudiced by the bias of political partisanship. It is of such men that the Upper House should be largely composed, and the presence of Mr. Gowan in that body is a testimony to the propriety and benefit of such a course.

For thirteen sessions successively he was chairman of the Divorce tribunal in the Senate—thus, with previous service on the bench, making the unique record of fifty-five years of judicial work.

In 1870 Mr. Gowan was admitted to King's Inn and called to the bar of Ireland. In 1893, as a tribute to his public services, he received the distinction of being made a companion of "The Most Distinguished Order of St. Michael and St. George."

Though the greater part of his life was given to the law, and his later years to the service of the public in the Senate of Canada, there were other matters in which he took a hearty interest. In this connection we may quote from an article which appeared in the *Toronto Globe* on the occasion of his last birthday :—

"The senator's career promises to be as extended as it has been useful. The date on which Senator Gowan was appointed a judge, brings us back to the period when Ontario was in the formative state. From 1843 to 1883 is a notable stretch of time for the exercise of judicial functions, and the changes which Judge Gowan saw and helped to bring about were radical and far reaching. In the young communities of those days, it was imperative that the educated and public-spirited should spare time for the duties of citizenship outside of their special calling. Judge Gowan accordingly, besides his special services as judge, as a codifier of the laws, and as a member of judicial commissions, acted on

educational boards of various kinds, and indeed bore more than his share in the life of the growing municipalities. Full of years and honours is a trite phrase, but it applies so happily to Senator Gowan that none better could be coined to fit the case."

Yes! it is quite true the subject of this sketch as a pioneer judge within the sphere of his influence "set the pace" in all that made for moral and material progress. It is well for any country if its citizens work well and faithfully for their own day and generation; it is better still when their work is not limited to that, but looks forward to future needs—needs which perhaps are only recognized by those who, with a sort of prophetic instinct, well and truly lay foundations for men of a future day and generation to build upon. Such was the character of much of the effort put forth by the one of whom we speak, whose life has truly been a series of public services and patriotic efforts.

One of his last acts was in connection with the volunteer force of Canada with which he was connected in his student days. In remembrance of this, and with that loyal devotion to his Queen and country, which has always distinguished him, and seeing with others the necessity for a thorough training of our citizen soldiers for service in the field, he recently presented for competition amongst the regiments of his own province a beautiful silver challenge cup of great value, designed by himself, as a prize for superior efficiency in those matters which should distinguish the soldier of to-day.

Few men of greater individuality, keen far-sightedness and breadth of interest in all public matters have occupied prominent positions in this country; whilst those who have enjoyed his friendship in private and family life know from happy experience his kindly disposition, his warm and untiring friendship and his generosity of heart. The writer here ventures to quote from a letter recently received from Lord Dufferin and Ava, wherein he thus speaks of him:—"Thank you for what you tell me of my dear old friend Judge Gowan. I have the greatest respect and affection for him. A more conscientious, honourable and high minded man does not exist."

Though he has arrived at an advanced age his intellectual powers are as clear as ever. May he long be spared to be useful to his country, and to enjoy the good wishes of those who are privileged to know him.

We notice that a book is now in the press on Company Law in Canada by Mr. Masten of the Ontario Bar, which is to contain the various Dominion and Provincial statutes governing companies, with references to the corresponding provisions in the Imperial acts; Notes of the Canadian and some of the leading English and American decisions on the more important branches of company law, with a number of practical forms. We have received some of the advance sheets from the publishers, the Canada Law Book Company, and the appearance of them augurs well for the usefulness of the work.

We have much pleasure in acceding to the request of the Secretary of the American Bar Association to refer to the resolution adopted at their annual meeting on August 29, as to the late Lord Russell. It speaks of his brilliant career and the high office which he so worthily filled, and recalls "the noble address which he delivered to this Association in August, 1896," and expresses the sympathy of the members of the Association with the Bench and Bar of England in so great a loss to the profession. Another minute of the same Association adopted at the same meeting refers to the banquet given in London in the ancient Hall of the Middle Temple by the Bench and Bar of England to their brethren of the Bench and Bar of the United States, and places upon record the Association's hearty acknowledgment of this fraternal act and a cordial reciprocation of the sentiment which prompted it.

A LAW REFORMER.

The Police Magistrate of the City of Toronto has recently from his seat on the Bench delivered himself of some very remarkable utterances. It is not a pleasant duty to criticise adversely one who holds a judicial position, especially when he is an esteemed friend and a worthy and useful citizen; but, as he deals with the legal profession in a manner which we conceive to be wholly unfair, a duty seems to be cast upon us to take up the gauntlet.

It appears that a client of a solicitor made a charge against the latter of theft, on the ground that he had retained for costs a large portion of a sum of money which she said he had received on her account. It is surprising how such a matter could ever have come before a criminal tribunal, and this in itself would seem to be an abuse of the process of the Court; but however that may be, the

County Attorney, when the charge came before the Police Magistrate, explained to the Court that as the money had evidently been retained by the solicitor for legal charges, which were claimed to be due to him, there was no case to come before his Worship, and the charge was at once withdrawn. The Police Magistrate, thereupon—there being no case before him, and without any evidence except the ipse dixit of the complainant—proceeded in effect to accuse the solicitor of misappropriating money belonging to his client, and further, to make wholesale charges of wrong-doing against the profession as a class, winding up with some suggestions, as crude as they were comical, as to how legal business should be conducted. Were these observations made at an after-dinner speech they would have been received "with roars of laughter" (the Colonel is fond of a joke and tells a good story) and might be ignored; or, if they had been known only to a gaping crowd at a Police Court they would do little harm; but being uttered from the Bench by a person holding a judicial position, they cannot be passed over, more especially so as they have been circulated broadcast through the Press, so that many will be led to believe that the profession here is the degraded thing he charges it with being.

There is a personal feature of the case which may first be disposed of, and which, strangely enough, never seems to have occurred to the worthy Colonel, who, after all, apart from an occasional eccentricity, is an excellent Magistrate. He speaks of the "enormous charges" which lawyers make against their clients, but adds, by way of contrast, that in *his* Court "they try to get along without making any charges for costs if they can help it, and then the costs are very small." As a matter of fact, the costs of the Police Court are enormously greater in proportion than in any civil court; but let that pass. Now, the Police Magistrate, being of course a professional man, we are glad to see him well paid, but as he is so strongly of the opinion that there should be a reduction in lawyers' fees, it would be reasonable that he should begin by suggesting a large reduction in his own salary. For his services he is paid the sum of \$4000 per annum, which, in proportion to the amount of time spent is vastly greater than the fees received by any Minister of the Crown, Chief Justice, or other official in the Dominion. It may also be noted that some time ago the City authorities were persuaded to give him an assistant, who does half the work that devolved upon him, and who receives \$750 per annum. The gallant Colonel

does not pretend to know much law, but he knows something else of more value.

Having taken for granted, without any evidence that the statement of the complainant in the case before him was correct, he dilates upon the monstrous iniquity of people being deprived of their money by these rascally lawyers: "Now-a-days it is next to impossible to get anything out of a suit in Court after the lawyers have finished with it. Hundreds and thousands of cases have arisen within the past few years in which there has been little or nothing left for clients when the charges for lawyers' services have been paid. The fees collected are outrageous." It would be difficult to work into any three sentences a larger collection of reckless statements and false charges. What a wide knowledge comes from the sing-song of Police Court practice: "A dollar and costs or thirty days—Next case!" These acts of villainy, moreover, are in the thousands. "Oh, mother, I saw more than a thousand cats in our back yard last night." "Nonsense, my child." "Well, I saw a hundred." "Don't exaggerate." "Well, I am sure there were ten; at least, I know there was the black cat from next door." Upon cross-examination might not the thousands of cases suffer a similar reduction.

As to the subject matter of the charges made, let it be distinctly understood that, as stated, they are utterly unfounded, and made against a body of men who are as honest and honorable as any class in the community; that legal charges in this Province are not enormous, but, as compared with other countries, very moderate, and this the Police Magistrate, a lawyer himself, ought to know. At least he could easily inform himself on the subject, and should have done so before making these charges. Also, let it be understood that such charges are not the deliberate and thoughtful utterances of a judge competent to give an opinion, but of one who is not familiar with the matters which he so airily discusses, and his work, which is only to deal with ordinary Police Court cases does not help him to speak with any authority on the subject.

Were he discussing Imperial federation or military matters his remarks would doubtless be both instructive and interesting, but as to legal matters—why, the boast of the learned Police Magistrate is that he does not know or care anything about law—that he is a law unto himself.

We might add that, as the tariff of fees was prepared with great care by a Board of Supreme Court Judges, who are competent from their knowledge to deal with such matters, and who are his superior officers, it is not (to say the least) in good taste to criticise their action or judgment as he has done on this and on other occasions.

The learned Magistrate, after the obiter dicta above referred to proceeds to give his views as to how the legal business of the country should be conducted:—"Why cannot civil business be done as cheaply as criminal business. I would do away with the profession altogether. All the business now transacted by lawyers could be done just as well by the State." Surely this must have been said in joke. Comment is impossible, except to remind the speaker that no man is compelled to employ a lawyer. Any litigant has the right to appear in person, and if he does he is always treated by judges with the utmost courtesy. He then takes the judges to task: "In one Court two judges will take one side and one will take another." This is undoubtedly as sad as it is true, but it is likely to continue to the end of time, unless indeed this wonderful reformer can invent some process by which all men's minds can be run into the same mould. He is also correct in saying that "In the Court of Appeal the judgment will perhaps be adverse, and three judges will support the opinion of the minority number of the Court below, while two will agree with the first judgment. Then it goes to the Supreme Court," etc. All this may also be admitted, but how to prevent it is the problem. It is evident that the engrossing duties of the Police Magistrate have prevented his having heard that the best men at the Bar and the most enlightened patriots of the country have for half a century been and are giving their best thought towards ascertaining the best and cheapest system of legal procedure and administration of justice. Obviously, the thought in his mind is that the only way to get over the difficulties that vex his soul is to transfer all the litigation of the Province to the Toronto Police Court, where prompt justice will be administered at a "very small" cost and without the intervention of such unnecessary and objectionable characters as lawyers. Who is to do the rest of the work, now done by a thousand lawyers or so, he does not say. We fear, however, that under such circumstances the presiding Judge would not be able, as he does now, to leave his office after an hour or two's work and devote the rest of the day to his own private affairs.

THE LAW OF OPTIONS.

I. INTRODUCTORY.

1. Scope of article.
2. Options distinguished from complete contracts.

II. NECESSITY FOR A CONSIDERATION TO SUPPORT AN OPTION.

3. Option prior to acceptance, not binding on either party, unless supported by a consideration.
4. Discussion of the rule.
5. Initial consideration not necessary, where subsequent acts are done in reliance upon the offer.
6. Option on consideration binds grantor, but not grantee.
7. Acceptance of offer, whether supported by a consideration or not, creates a contract binding both parties.

III. COMPLETION, REVOCATION AND ABANDONMENT OF RIGHTS ARISING OUT OF OPTIONS.

8. Acceptance generally.
9. Acceptance must be of precise terms offered.
10. Sufficiency of the acceptance.
11. To whom notice of acceptance should be given.
12. Acceptance by letter.
13. Revocation of acceptance.
14. Rejection of offer.
15. Revocation of options.
16. Relinquishment of rights under option.

IV. VALIDITY OF OPTIONS.

17. Requirements of the Statutes of Frauds.
18. Option obtained by fraud.
19. Validity as dependent on the power to grant the option.
20. Validity with reference to the rule against perpetuities.
21. How far options may be enforced apart from the rest of the contracts to which they are accessory.

V. RESPECTIVE INTERESTS OF THE PARTIES IN THE SUBJECT MATTER AFTER THE OPTION IS GRANTED.

22. Prior to the acceptance of the offer.
23. After the option is exercised.

VI. DURATION OF THE PRIVILEGE CONFERRED BY THE OPTION.

- 24. When the right to exercise the option first accrues.
- 25. When the right expires.
- 26. Death of party making the offer, effect of.
- 27. Right of grantor of option to abridge the period for its exercise.

VII. WHAT PERSONS BESIDES THE IMMEDIATE GRANTEE ARE ENTITLED TO CLAIM THE BENEFIT OF OPTIONS.

- 28. Rights of a partner in an option.
- 29. Parties specially designated in instruments.
- 30. Heirs of grantees of options.
- 31. Administrators.
- 32. Assignees.

VIII. TO WHAT EXTENT THIRD PERSONS ARE BOUND BY THE EXISTENCE OF THE OPTION.

- 33. Parties acquiring the subject-matter of the option by testamentary provisions.
- 34. Subsequent purchases.
- 35. Creditors of the party giving the option.
- 36. Wife of party granting the option.

IX. NECESSITY FOR THE PERFORMANCE OF THE PRESCRIBED CONDITIONS BY THE GRANTEE OF THE OPTION.

- 37. Strict performance of conditions usually a pre-requisite to securing the benefits of an option.
- 38. Conditions considered without reference to the time fixed for performance.
- 39. Time usually of the essence of optional contracts.
- 40. Option lost if not accepted within period limited.
- 41. Acceptance must be within reasonable time where none is particularized.
- 42. Payment of purchase price or other sums stipulated at the specified time.
- 43. Delay in completing the contract after acceptance, consequence of.
- 44. When non-performance of conditions is excused.
- 45. Waiver of performance by grantor.

XI. ENFORCEMENT OF OPTIONS BY THE COURTS.

- 46. Mutuality.
- 47. Certainty of the terms.
- 48. Right of grantee of option to a good title.

- 49. Right to exercise option lost by estoppel.
- 50. Where the adequacy of the price is left to the discretion of the trustees.
- 51. Equities adjusted under special circumstances between lessee and under-lessee, with option of renewal.
- 52. Enforcement of provisions giving continuing partners the option of purchasing share of retiring partner.

XII. OPTIONS TO DO ONE OR OTHER OF TWO ALTERNATIVE THINGS.

- 53. Generally.
- 54. Construction of leases giving landlords the option to renew or pay for improvements.
- 55. Options as to return and surrender of stock.

I. INTRODUCTORY.

1. *Scope of article.*—What is commonly known among business men as an "option" may be defined as "a contract by which the owner of property agrees with another person that he shall have the right to buy his property at a fixed price within a time certain" (a). It is obvious, however, that, from a juristic standpoint, the characteristic feature of this class of contracts is the acquisition by one party of a privilege of demanding from another party at a future time the surrender of a something valuable; and, as this element exists in other transactions besides those which involve an entire divestiture of ownership, no dissertation of the scope suggested by the title of the present article would be complete, if it did not refer to all the cases dealing with every class of contract which contemplates a subsequent transfer of any valuable interest in real or personal property, irrespective of the question whether such transfer was temporary or permanent, absolute or qualified. In the following pages, therefore, it is proposed to collect all the decisions which relate to rights of future acquisition, so far as those rights are contingent upon, and become perfected by, the expression by one or more of the parties concerned of his or their desire for a transfer of the subject matter of the given transaction or negotiation. Such rights of this description as are created by special statutory powers of purchase conferred upon public or quasi-public corporations, stand upon a peculiar footing, and will not be noticed, except in so far as the decisions on this head may be useful by way of

(a) *Ide v. Leiser* (1890) 10 Mont. 5, 24 Am. St. Rep. 17.

analogy (b). Nor is it intended to discuss the circumstances under which optional contracts may be invalid, as infringing the laws against gambling.

2. Options distinguished from complete contracts.—The question sometimes arises whether a transaction amounts to a sale in presenti, or whether the transfer contemplated is dependent upon some future expression of his wishes by the proposed vendee. This must be determined by the words employed by the owner of the property.

It may also be a matter for controversy whether a person dealing with property on which there was an option had the right to dispose of it for his own personal benefit, or was merely acting as the agent of the owner of the property with the advantages and disadvantages of that position. The rulings referred to in the subjoined note will show the view some American courts have taken of the points arising under this head.

(b) See, generally *Darts' V. & P.* pp. 242, et seq.

(c) An instrument, although worded as an agreement to sell, will be construed merely as an offer to sell, where a postscript is appended stating that "this offer" is to be "left over" till a date fixed. *Dickinson v. Dodds* (C.A. 1876) 2 Ch.D. 463. By a telegram asking if the addressee will sell the senders specified real estate, and adding the words: "Telegraph lowest price," a reply merely stating the lowest price, and an answer thereto, agreeing to buy the property at the price named, no contract of sale is constituted, since there is no offer to sell, but a mere statement of the lowest price. *Harvey v. Facey* (H.L.E.) [1893] A.C. 552. A paper in which the owner of land recites that another party is to have, for a specified period, the "refusal" of the land, is a mere offer, not an agreement to sell. *Potts v. Whitehead* (1869) 20 N.J. Eq. 55. A memorandum to the effect that A "agrees to sell a certain farm to B for a price payable on a certain date does not imply a mere offer to sell, but a completed contract. *Ives v. Hasard* (1855) 5 R.I. 25, 67 Am. Dec. 500. An absolute contract of sale, and not a mere option, is evidenced by an instrument reciting that the first party has "this day sold" the subject matter, although the purchase price is not to be paid, nor the deed made till a later date. *Monongah &c. Co. v. Fleming*, 42 W. Va. 538; or although the terms of sale are to be complied with in a certain time, or "deposit hereby made will be forfeited." *Haselton v. LeDuc*, 10 App. D.C. 379.

(d) Where the language of a memorandum given to a real estate agent leaves it doubtful whether the option was to buy as well as to sell, a court will not infer that the agent is entitled to become the purchaser. *Colbert v. Shepherd* (1892) 89 Va. 401. A contract giving a person "the exclusive sale of my land for sixty days for \$6000, and also providing that he "must get his commission above that," does not confer upon that person an option to purchase the property, but simply makes him the exclusive agent of the landowner for the sale of the property. *Chesum v. Kreighbaum* (1892) 4 Wash. 680. The insertion of an agent's name in the instrument granting the option, merely for the purpose of facilitating the sale, and not with any idea of purchasing, does not estop him from claiming his commission as agent. *Russell v. Audral* (1891) 79 Wis. 108. Oral evidence to show that the plaintiff was an agent for the sale of land is not objectionable on the ground that it tends to vary a prior written contract by which he had an option to purchase the same land. Such evidence merely has the effect of establishing a distinct contract. *Riemer v. Rice* (1894) 88 Wis. 16.

Cases of an option to purchase are not infrequently controlled by the peculiar doctrines of equity which have the effect of converting a transaction which on its face, is an absolute sale, into a mortgage. A detailed discussion of these cases falls outside the scope of the present article, and it will be sufficient to note that, *prima facie*, an absolute conveyance, containing nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage, merely because the vendor stipulates that he shall have a right to repurchase. In every such case the question is, what, upon a fair construction, is the meaning of the instruments? (c)

II. NECESSITY FOR A CONSIDERATION TO SUPPORT AN OPTION.

3. Option prior to acceptance, not binding on either party, unless supported by a consideration.—A doctrine now firmly established in all countries where the common law is administered is that an option, even though it is by its express terms to remain open for a definite period, will not bind the party giving it, nor, *a fortiori*, the party to whom it is given, unless it is supported by a consideration moving from the latter (d). Either party, therefore, may withdraw

(c) *Alderson v. White* (1858) 2 DeG. & J. 97, 3 Jur. N.S. 1316, per Lord Cranworth. An agreement between a mortgagor and mortgagee by which the latter parts with his equity of redemption with a provision allowing re-purchase on specified terms has been treated as an absolute sale in *Gossip v. Wright* (1863) 9 Jur. N.S. 592, citing *Emsworth v. Griffiths*, 5 Bro. P.C. 184; *Sevier v. Greenway*, 19 Ves. 412. The best general indication of the intention of the parties in cases where there is a sale with power of re-purchase seems to be the existence or non-existence of a power in the original purchaser to recover the sum named as the price for such repurchase; if there is no such power, there is no mortgage. *Dart's V. & P.* p. 926.

(d) In *Cooke v. Oxley* (1790) T.R. 653, the declaration stated a proposal by the defendant to sell to the plaintiff 266 hogsheads of sugar at a specific price, that the plaintiff desired time to agree to, or dissent from, the proposal till four in the afternoon, and that defendant agreed to give the time and promised to sell and deliver, if the plaintiff would agree to purchase and give notice thereof before four o'clock. The court arrested the judgment on the ground that there was no consideration for the defendant's agreement to wait till four o'clock, and that the alleged promise to wait was *nudum factum*. It was recently remarked that all that this decision affirms is "that a party who gives time to another to accept or reject a proposal is not bound to wait till the time expires." *Stevenson v. McLean* (1880) 5 C.P.D. 346, per Lush, J. Mr. Benjamin (Sales, 7th Am. Ed. 52) points out that *Cooke v. Oxley* turned solely on the insufficiency of the plaintiff's allegation, and that, viewed in the light of the subsequent decisions, it would have been sufficient for him to have alleged that, at the time he gave notice of acceptance, no notice of its withdrawal had been communicated to him.

from the negotiations at any time prior to the time when the one to whom the offer is made accepts it (*e*), for it is only after such acceptance that an agreement mutually obligatory is deemed to exist. See sec. 8 post. The principle is that, "till both parties are agreed, either has a right to be off" (*f*). The mere fact that the subject-matter to which the undertaking relates is one of those which is within the provisions of the Statute of Frauds, and that the offer is duly reduced to writing will not affect the operation of this principle (*g*).

The same principles are applicable where, without any new consideration, the time for an option which was itself granted upon a consideration is extended. Such an undertaking is not obligatory, as the consideration for the first option will not do service for the second (*h*).

4. Discussion of this rule.—The rule established by the cases just referred to in the preceding section is different from that of the Civil Law, which treats as binding a promise to keep a proposal open for a definite time (*i*). It seems impossible to deny that this is one of the numerous instances in which that system is more consonant than our own to natural justice as well as to common sense. To the criticism of those jurists who take the ground that it is inconsistent with the plain principles of equity, that a person who has been induced to rely on such an engagement should have no remedy in case of disappointment (*j*), the only answer available is

(*e*) *Routledge v. Grant* (1828) 4 Bing. 653. See also *Bristol &c. Co. v. Maggs* (1890) 44 Ch. 616; *Martin v. Mitchell* (1820) 2 J. & W. 413, 428; *Thornbury v. Bevil* (1842) 1 Y. & C.C.C. 554; *Head v. Diggon* (1828) 3 Man. & Ry. 97; *Butler v. Thomson* (1875) 92 U.S. 412; *Eliason v. Henshaw*, 4 Wheat. (U.S.) 228; *Carr v. Duval* (1840) 14 Pet. (U.S.) 77; *Boston &c. R. Co. v. Bartlett* (1849) 3 Cush. 224; *Houghwout v. Boisanbin* (1867) 18 N.J. Eq. 315; *Souffrain v. McDonald* (1866) 27 Ind. 269; *Eskridge v. Glover* (1834) 26 Am. Dec. 344, 5 Stew. & Port. (Ab.) 264; *Faulkner v. Hebard* (1854) 26 Vt. 452; *Weaver v. Burr* (1888) 31 W. Va. 736; *Dyer v. Duffy* (1894) 39 W. Va. 148, 24 L.R.A. 339; *Gordon v. Darnell* (1880) 5 Colo. 302; *Connor v. Renneker* (1886) 25 S.C. 514; *Larmon v. Jordan* (1870) 56 Ill. 204; *House v. Jackson* (1893) 24 Or. 89; *Crandall v. Willy* (1897) 166 Ill. 233; *Guston v. Union School Dist.* (1893) 34 Am. St. Rep. 361, 94 Mich. 502; *Warren v. Costello* (1891) 109 Mo. 33.

(*f*) *Routledge v. Grant* (1828) 4 Bing. 653.

(*g*) *Borst v. Simpson* (1889) 90 Ala. 373; *Burnet v. Bisco* (1809) 4 Johns (N.Y.) 235.

(*h*) *Ide v. Leisen* (1890) 24 Am. St. Rep. 17, 10 Mont. 5; *Coleman v. Apple-garth* (1887) 6 Am. St. Rep. 417, 68 Md. 1.

(*i*) See Pollock Contr. p. 24.

(*j*) See *Boston &c. R. Co. v. Bartlett* (1849) 3 Cush. 224.

the very unsatisfactory one that, the rule being what it is, and presumably known to everyone who is considering an offer, his reliance upon the promise is of the qualified character which would naturally be induced by his realization of the fact that he has no remedy if the other party chooses to withdraw from the offer. But this circumstance is quite irrelevant as a factor in any discussion of the abstract merits or demerits of the rule itself. In the present instance, moreover, the presumption of the knowledge of the law is perhaps less than ordinarily justifiable, for a goodly proportion of the cases which come before the courts show that it is extremely difficult to instil into mankind the requisite appreciation of the fact that a promise is not legally binding, unless the promisor has given a tangible proof of his sincerity by accepting something of value from the promisee.

Nor are the above objections the only ones which may be made to the present rule. It may, we think, be fairly argued that the rule is not, as has been assumed, a necessary corollary of the common-law doctrine as to consideration. That doctrine would still have been preserved intact, if the courts, recognizing that, in the usual course of business affairs, persons receiving offers which are expressed to stand good for a definite period intend to, and actually do, expend a greater or less amount of time, trouble, and even money, in gathering information which will enable them to form a proper judgment upon the question whether the offers are worth accepting, had seen their way to treating the situation which exists when such an offer is made as one which essentially implies the giving of mutual promises by the parties, viz., an undertaking by the grantor of the option to surrender something valuable, if called upon within the period limited, and an undertaking by the grantee to make such investigation as may be reasonably necessary to ascertain, before that time expires, whether it is worth his while to demand the transfer contemplated by the option (*k*). The hypothesis of such mutual promises, which would of course suffice as a legal consideration, would not only not be a strained one under the circumstances, but would evidently have a much more solid basis of fact and practical experience to support it than many of the suppositions from which implied obligations are deduced in our jurisprudence. Upon general principles, of course, a failure of the consideration inferred from this *prima facie* presumption of real exertion and sacrifice of time and money by the grantee of the option would be open to rebuttal by appropriate testimony,

(*k*) The outrageously unfair results to which the present rule sometimes leads are strikingly exemplified in the refusal of an American court to recognize as mutual and binding a contract signed by the owners of land only, by which it is agreed that they will take a specified price for their mineral interest, and upon receipt of such price make title to the party of the second part, and that such party will make such tests as are satisfactory to himself, and do other things towards the perfection of the said sale as may be necessary on his part, and will not demand any rights outside of necessary tests, until the payment of the price. *Peacock v. Deweese* (1884) 73 Ga. 570 [injunction to restrain sale by owners to third party, refused].

and the analogies of the law of evidence indicate that, as a matter of procedure, such grantee should have the burden of proving that the presumption was justified by what was actually done by him in reliance on the promise of the grantor.

If due account had thus been taken of the normal acts and intentions of a person taking options, the resulting rule, while not trenching in any real sense upon the present doctrine of consideration, would have brought the common law into closer conformity with natural justice, and, if fenced about by the securities suggested, would have furnished an amply sufficient protection to the owner of the subject-matter of the offer. The rule now administered, ascribing, as it does, a controlling importance to the immediate transfer of a consideration often so small as to be quite nominal and merely formal, and wholly ignoring the course of action which is followed in a large majority of instances by grantees of options—at all events where the transaction is a part of a legitimate business transaction, and not purely speculative—deserves to be classed with that singular anomaly of the doctrine of accord and satisfaction which provoked the pungent remark of Sir George Jessel as to the extraordinary value which the common law attributes to a canary bird when it happens to be accepted in partial discharge of a debtor's liability.

5. Initial consideration not necessary, where subsequent acts are done in reliance upon the offer.—The hardships which the existing doctrine sometimes entails are to some extent mitigated by the operation of the doctrine that if the person to whom the promise is made should incur any loss, expense, or liability in consequence of the promise, and relying upon it, the promise thereupon becomes obligatory (*l*). An important limitation to this rule in the case of options upon land is that the party seeking to enforce the conveyance cannot receive any advantage from acts done on the land after the offer is made, unless they are such as are authorized by the offer (*m*). Nor can the rule be made to cover the acts of the party holding the option which are merely done for the purpose of ascertaining whether the property is worth acquiring (*n*).

(*l*) *Morse v. Bellows* (1835) 7 N.H. 549, 28 Am. Dec. 372; *Gordon v. Darnell* (1880) 5 Colo. 302 [entry followed by improvements]; *Perkins v. Hasdell* (1869) 50 Ill. 216 [taxes paid and improvements made]; *Wall v. Minneapolis & C. R. Co.* (1893) 86 Wis. 48 [entry within time limited, and improvements made]; *Byers v. Denver & C. R. Co.* (1889) 13 Colo. 552 [railway constructed].

(*m*) *Sutherland v. Parkins* (1874) 75 Ill. 338 [lessee in possession began to make fences].

(*n*) See *Peacock v. Deweese* cited in note to sec. ante. For another exception to the rule, see *Bostwick v. Hess*, referred to in sec. 22 (b) post.

6. Option on consideration binds grantor, but not grantee.—It is equally well settled that one who, for a consideration which the law recognizes as sufficient to support a promise (*n*), agrees that another party shall have the privilege of deciding at some future time whether he will avail himself of an offer, is precluded from revoking the offer, until the specified period has expired (*o*), except in so far as he may have reserved the liberty of dealing with the subject-matter so as to defeat the inchoate rights conferred by the offer (*p*). For the purposes of this rule it is enough if the option granted was accessory to another contract in such a manner that the consideration of the latter may be regarded as supporting the option. The most common illustration of this situation is supplied by the cases which treat the rent reserved in a lease as the consideration which supports any option which may be granted to the lessee in respect to the purchase of the premises or a renewal of the lease (*q*). Other illustrations of the same situation are furnished by those cases in which a person contracts for the supply of an article for a definite time with an option of having the supply

(*n*) Such as the note of the grantee of the option *Cherry v. Smith* (1842) 3 Humph. 19, 39 Am. Dec. 150; outlay of money and labour on the property, *Clarno v. Grayson*, 30 Or. 111, waiver of security required to be given by a purchaser at a judicial sale, *Bradford v. Foster* (1888) 87 Tenn. 4; a promise to transfer stock, *Faulkner v. Hebard* (1854) 26 Vt. 452.

(*o*) *Warren v. Costello* (1891) 109 Mo. 33; *Linn v. McLean* (1885) 80 Ala. 360; *Ross v. Parks* (1890) 93 Ala. 153, 30 Am. St. Rep. 47, 11 L.R.A. 148; *Hanna v. Ingram* (1890) 93 Ala. 482; *Guylor v. Warren* (1898) 175 Ill. 328; *Bradford v. Foster* (1888) 87 Tenn. 4, overruling *Gillespie v. Edmundson*, 11 Humph. (Tenn.) 553. "A man may as well bind himself to make a contract as bind himself by a contract," *De Rutte v. Muldron* (1860) 16 Cal. 505. "The owner parts with his right to sell his lands (except to the second party to the contract) for a limited period. The second party receives this right, or rather from his point of view, he receives the right to elect to buy," *Ide v. Leiser* (1890) 10 Mont. 5, 24 Am. St. Rep. 17.

(*p*) An option in a lease is not absolute for the period specified, where there is a proviso that, if the lessor should receive an offer, the lessee should be given notice, and then have the privilege of purchasing within a time limited. *Harding v. Gibbs* (1888) 8 Am. St. Rep. 345, 125 Ill. 85, where it was also held to be immaterial whether notice was given by the lessor or the person making the second offer.

(*q*) *Gustin v. Union &c. Dist.* (1893) 34 Am. St. Rep. 361, 94 Mich. 502; *Hawralty v. Warren* (1866) 18 N.J. Eq. 124, 90 Am. Dec. 613; *Re Jane Hunter* (1831) 1 Edw. Ch. (N.Y.) 1; *House v. Jackson* (1893) 24 Or. 89; *Schroeder v. Gemender* (1875) 10 Nev. 355; *Souffrain v. McDonald* (1866) 27 Ind. 269; *Hayes v. O'Brien* (1894) 149 Ill. 403; *Marske v. Willard* (1896) 68 Ill. App. 83, 169 Ill. 276; *De Rutte v. Muldron* (1860) 16 Cal. 505; *Hall v. Center* (1870) 40 Cal. 63. Improvements made upon property under a prior lease are sufficient consideration to support an option contained in a renewal lease for the purchase of the property, *House v. Jackson* (1893) 24 Or. 89.

continued for an additional period. The contract is then treated as an entire one, part of the consideration of which is the option to take the goods for the extended term (*r*).

Of course if an option, whether given by a lease or as part of any other kind of transaction, is evidenced by a covenant it comes within the principle that a contract under seal stands on the same footing as one supported by an actual consideration (*s*). It should be noted, however, that, as equity will always inquire into the consideration of a contract, regardless of its form, a seal will not supply the place of a real consideration in a suit for specific performance if it is proved that none actually passed (*t*).

The grantee of an option, on the other hand, is not in any way bound by merely expressing his willingness to consider an offer (*u*). It is obvious, indeed, that any other theory of the situation would be wholly inconsistent with the essential import of these transactions, which is simply that a certain amount is given for the privilege of considering whether it will be worth while to acquire some valuable interest within the period specified.

7. Acceptance of offer, whether supported by a consideration or not, creates a contract binding both parties.—The acceptance of the offer within the period specified by the party making it has the

(*r*) *Christian &c. Co. v. Brenville &c. Co.* (1894) 106 Ala. 124.

(*s*) *Faulkner v. Hebard* (1854) 26 Vt. 452; *Willard v. Tayloe* (1869) 8 Wall. 557; *O'Brien v. Boland* (1896) 166 Mass. 481; *Mansfield v. Hodgdon* (1888) 147 Mass. 304. See also the English cases, hereafter cited, as to options of purchase granted in leases which, although not deciding this point in express terms, obviously assume the correctness of the doctrine in the text.

(*t*) *Crandall v. Willig* (1897) 166 Ill. 233.

(*u*) *Coleman v. Applegarth* (1887) 6 Am. St. Rep. 417, 68 Md. 1; *Harding v. Gibbs* (1888) 125 Ill. 85, 8 Am. St. Rep. 345. A lease allowing the lessee an option to purchase before a certain date, the rent to form part of the price, and providing that, if he should determine not to purchase and notify the lessor thereof, the payment of the rent should be postponed to a specified day, does not become a binding contract of sale for the reason that the lessee fails to give notice of his intention not to purchase. *McCalmont v. Mulhall* (1858) 4 All. (N.B.) 200. Where one has the beneficial use of the property of another, and agrees to pay instalments which are described as rent or hire instalments, and which he is entitled to treat as payments for hire only, an obligation to purchase will not be predicated for the reason that it is also stipulated that by continuing to make the payments for a certain time he shall acquire the property. This stipulation still leaves him the power, at any moment, and at his own will, by returning the property to the owner, to put an end to any obligation to pay any further instalments. *Helby v. Matthews* (H.L.E.) 1895 A.C. 47. The special question in this case was whether the hirer was a person who had "agreed to buy goods" within the meaning of the Factors Act of 1889, sec. 9, so as to prevent the bailor from recovering the chattel from a pawnbroker to whom it had been pledged after a few payments had been made.

effect of substituting a bilateral contract for the option, and from that moment both parties are bound, irrespective of the question whether the option was supported by a consideration or not (*v*). The exercise of an option is not merely the initiation of a new contract which, like a proposition, requires acceptance to complete it (*w*).

A similar rule holds in the case of an extension of an option without consideration, which, though not at first a binding contract, becomes such if it is accepted before retractation (*x*).

III. COMPLETION, REVOCATION AND ABANDONMENT OF RIGHTS ARISING OUT OF OPTIONS.

8. Acceptance generally.—A general discussion of the principle upon which it is determined whether the acceptance of an offer is complete in such a sense that a binding contract is constituted, would be out of place in this article. As a whole, these principles are the same in the case of offers which, like options, are essentially of a continuing character, as in the case of offers which are supposed to be accepted or rejected at once or within the briefest period that the course of business admits. It will be useful, however, to advert

(*v*) *Lord Lilford v. Powys Keck* (1862) 30 Beav. 295; *Byrne v. Van Tienhoen* (1880) 5 Q. B. D. 344; *Willard v. Taylor* (1869) 8 Wall. 557; *Wilks v. Georgia Pac. R. Co* (1885) 79 Ala. 180; *Linn v. McLean* (1885) 80 Ala. 360; *Guyer v. Warren* (1898) 175 Ill. 328; *Dambmann v. Rittler* (1889) 14 Am. St. Rep. 364, 70 Md. 380; *Wilcox v. Cline* (1888) 70 Mich. 517; *Houghwout v. Boisaubin* (1867) 18 N. J. Eq. 315; *Fessler's Appeal* (1874) 75 Pa. 483; *Clarke v. Gordon* (1891) 35 W. Va. 735; *Donnelly v. Parker* (1872) 5 W. Va. 301; *Watson v. Coast* (1891) 35 W. Va. 463. Under a stipulation that the intending lessee was to "have a purchasing clause" of the estate, at any time within nine years, by giving three months' notice," for a specified sum, the relation of vendor and purchaser is substituted for that of lessor and lessee after the period of notice has expired. *Pegg v. Wisden* (1852) 16 Beav. 239. A lessor is bound at once without a new lease, where the lessee is to have the privilege of an extension of the term for a further period specified "by notice" to the lessor. *McClelland v. Rush* (1892) 150 Pa. 57; *Hansauer v. Dahlman* (1893) 72 Hun. 607. The right of a continuing partner who, by the articles, has an option to purchase a retiring partner's share, is absolute as soon as he exercises it. *Warder v. Stillwell* (1856) 3 Jur. N. S. 9 [ineffectual attempt made by retiring partner to revoke offer and have the partnership dissolved].

(*w*) *Shollenberger v. Brinton* (1866) 52 Pa. 98. It has been declared by a distinguished American court that the acceptance is regarded as a sufficient legal consideration for the engagement on the part of the person making the offer, *Boston &c. R. Co. v. Bartlett* (1849) 3 Cush. 224; *Bray v. Harper* (1849) 3 Cush. 158. But probably a more precise way of explaining the rationale of the change in the relation of the parties is that the acceptance implies consent, and this consent implies a promise to do the acts which will eventuate in the ultimate transfer of interests which is contemplated.

(*x*) *Ide v. Leiser* (1890) 24 Am. St. Rep. 17, 10 Mont. 5.

briefly to a few of the cases which seem to be more especially pertinent to the the present discussion.

In some of these cases a preliminary question has presented itself, viz., whether the evidence adduced shows the conclusion of a bilateral contract, or merely indicates that the person to whom the offer is made is willing to be bound by the terms proposed in the event of his ultimately electing to accept the offer. The answer to the question depends of course entirely upon the words employed in the communication, written or verbal, which have passed between the parties (*y*).

The consent of all the persons to whom an option is given is necessary to the exercise of that option by one of them (*z*).

9. Acceptance must be of precise terms offered.—There is no such acceptance as the law requires in order to create a mutually binding contract where it is conditional (*a*), or varies in its terms from

(*y*) A vendor's exercise of an option to take a lease of the premises sold by him at any time within twelve years after the conveyance is sufficiently established, where the vendor has written to the vendee a letter, which is expressly stated to be "a temporary thing until the completion of your purchase, and the signing of the agreement between us already prepared relative to the future holding of the farm by me," and has subsequently had the use of the property and paid rent. *Powell v. Lovegrove* (1856) 8 DeG. M. & G. 357. On the other hand, where the owner of premises offers to sell them for a specified sum, to be paid six months after date, "otherwise the offer to be null, and the other party declares that he hereby accepts the offer," there is merely a unilateral contract, such acceptance being tantamount to an acceptance of the condition that the offer should be void, if the money should not be paid at the day appointed. *Nevitt v. McMurray* (1886) 14 Ont. App. 126. So no acceptance can be inferred from a letter which simply amounts to an offer by the party having the option to meet the owner of the land, and a notice that he will then be ready to make tender of the price and execute the proper agreements. *Potts v. Whitehead* (1869) 20 N.J. Eq. 55. So there is no valid contract where, no consideration being received by the defendants for giving the option, the defendant offered by Jetter to receive from the plaintiff company, and transport from one city named to another, railroad iron not to exceed a certain number of tons, during certain specified months, at a specified rate per ton and the defendant answers, merely assenting to the proposal, but does not agree on his part to deliver any iron for transport. The letter amounts to nothing more than the acceptance of an option by the plaintiff company for the transportation of such quantity of iron by the defendants as it chose. *Chicago &c. R. Co. v. Dane* (1870) 43 N.Y. 240.

(*z*) *Pratt v. Prouty* (1898) 104 Iowa 419.

(*a*) *Hyde v. Wrench* (1840) 3 Beav. 334. Compare *Lucas v. James* (1849) Hare 410; *Weaver v. Burr* (1888) 31 W. Va. 736 [offer to pay on the terms specified, so soon as the owner should convey it by proper deed.]

those of the offer (*b*), or contemplates the possibility of those terms being altered before the contract is formally executed (*c*).

10. Sufficiency of the acceptance.—(See also sec. 40, post.) Where the grantor of the option has formulated certain conditions as to the time and manner of giving notice of an election to accept, these conditions must be strictly complied with. (See IX post). If there are no express provisions of this sort, or no dispute as to the timeliness of the communication which is relied upon as showing that notice was given, the only question to be settled is whether the words used are such that an acceptance may fairly be inferred from them (*a*).

The filing of a bill before the end of the period limited, alleging readiness to pay and asking for specific performance is of course a sufficient notice of acceptance of the offer (*b*). So also is a tender of the purchase money (*c*), which, even when made after a sale to a third party, entitles the grantee of the option to specific performance (*d*).

Where there is no provision for notice, holding over by the tenant is notice of his election to renew (*e*).

As the Statute of Frauds only requires a writing signed by the party to be charged, it follows that, even where the subject-matter of an option is land, an acceptance sufficient in point of law may

(*b*) *Meynell v. Surtees* (1854) 3 Sm. & G. 101; *Hyde v. Wrench* (1840) 3 Beav. 334 [counter-offer on different terms].

(*c*) There is no absolute contract where the acceptance of the offer is "subject to the terms of a contract being arranged" between the party offering and the solicitor of the party accepting. *Honeyman v. Marryat* (1857) 6 H.L.C. 112.

(*a*) Sufficient notice of intention to renew a lease is given, where the secretary of the company to which the premises were leased, upon receiving a notification from the successor to the rights of the original lessor that the lease expired on the following day, writes back to the effect that "the directors are of course prepared to renew the lease." *Nicholson v. Smith* (1882) 22 Ch. D. 640. A letter sent by the person having the option in which he states that he elects to take the estate at a price fixed by the trustees of a will in accordance with its provisions, and goes on to ask that, if he has to sign any agreement, it may be forwarded to him is probably a sufficient exercise of the option. *Austin v. Tawney* (1867) L.R. 1 Ch. 143.

(*b*) *Maughlin v. Perry* (1871) 35 Md. 352.

(*c*) *Souffrain v. McDonald* (1866) 27 Ind. 249.

(*d*) *Hayes v. O'Brien* (1894) 149 Ill. 403.

(*e*) *Kelso v. Kelly*, 1 Daly (N.Y.) 419; *Schroeder v. Franklin* (1875) 10 Nev. 355.

be given by parol (*f*), or may be established by any other form of circumstantial evidence, outside the written instruments produced (*g*), as, for example, by the tender of the purchase price (*h*).

11. To whom notice of acceptance should be given.—Ordinarily, of course, the party to whom notice of an acceptance of an offer should be made is either the grantor himself or whatever person has succeeded to his rights of property in the subject-matter of the offer. If such successor is not sui juris at the time when the grantee of the option desires to exercise it, a court of equity will lend its aid and save the inchoate rights arising out of the offer by such relief as may be most appropriate under the circumstances (*a*). It would seem, moreover, that such a court will not feel itself precluded from enforcing an option simply because the notice was not, as required by the strict terms of the instrument conferring it, given to a person having an interest in the subject-matter as well as to the owner himself (*b*).

12. Acceptance by letter.—It is now well settled that, if an offer is made by letter, which expressly or impliedly authorizes the sending of an acceptance of such offer by post, and a letter of acceptance properly addressed is posted in due time, a complete contract is made at the time when the letter of acceptance is posted (*c*), provided it is directed to the proper address (*d*), though

(*f*) *Reuss v. Rickley*, L.R. 1 Exch. 342; *Houghmont v. Boisanbin* (1867) 18 N.J. Eq. 315; *Smith's Appeal* (1871) 69 Pa. 474; *Wall v. Minneapolis & C. R. Co.* (1893) 86 Wis. 48; *Ide v. Leiser* (1890) 24 Am. St. Rep. 17, 10 Mont. 5; *McLelland v. Rush* (1892) 150 Pa. 57.

(*g*) *Ives v. Hazard* (1855) 5 R.I. 25, 67 Am. Dec. 500.

(*h*) *Houghwout v. Boisaubin* (1867) 18 N.J. Eq. 315.

(*a*) *Woods v. Hyde* (1861) 31 L.J. Ch. 295 [notice to infant and guardian held sufficient, where trustees of will giving option of purchase disclaimed.]

(*b*) An Australian court has held that, where a tenant with the option of renewal has continued in possession for a year and paid rent, after giving notice to the attorney of the mortgagee of the land, equity will enforce his right to a renewal, although the covenant in the original lease was that the mortgagor and mortgagee would, if requested, grant a renewal. *Blackwell v. Smyly* (1866) 3 W.W. & A'B. (Vict. Eq.) 1.

(*c*) See the cases cited in the next three notes, and *Potter v. Sanders* (1846) 6 Hare 1 [question of priority of rights as between two purchasers]; *Linn v. McLean* (1885) 80 Ala. 360.

(*d*) *Potts v. Whitehead* (1869) 20 N.J. Eq. 55 [not enough to send it to a place to which the addressee only occasionally resorts].

there may be delay in the delivery (*c*), or though the letter never reaches the addressee (*d*). But this rule is subject to an exception where the offer is made by telegram. A prompt reply to such an offer is expected, and an acceptance by letter is not in time where it is known that it cannot be delivered till after the period during which the offer is to remain open has expired (*e*).

13. Revocation of Acceptance.—A retraction of an acceptance of an option communicated by letter is valid, provided it actually reaches the giver of the option before he receives the letter, but, in order to be effective, it must be as direct and explicit as the election itself (*f*).

14. Rejection of offer.—A definitive rejection of an offer will, of course, have the effect of determining the negotiations, but an inquiry whether the seller will modify the terms of a sale with respect to the time given for the payment of the price is not a rejection of the proposition which stands open at the time (*g*).

15. Revocation of options.—Where an option belongs to the class of revocable offers (see II. ante), the revocation to be effectual, must be actually communicated to the other party before he has accepted the offer (*h*). A notice of revocation which is not received until after a letter of acceptance was posted will not deprive the other party of the rights acquired by the despatch of the letter, (see sec. 12 ante). "An uncommunicated revocation is for all practical purposes, and in point of law, no revocation at all" (*i*). No formal or express notice of retraction is necessary.

(*c*) *Dunlop v. Higgins* (1848) 1 H.L.C. 400; *Harris Case*, L.R. 7 Ch. 587.

(*d*) *Household Accident Co. v. Grant* (C.A. 1879) 4 Exch. D. 216, Bramwell, L.J., dissenting.

(*e*) *Quenorduaire v. Cole* (1883) 32 W.R. 185.

(*f*) *Linn v. McLean* (1885) 80 Ala. 360 [no effective retraction implied from a conversation between the parties, held on the same day as the letter of acceptance of an option on land was posted and before it was received, where the letter was not referred to, and the subject of the interview was merely a pending adverse suit which affected the land].

(*g*) *Stevenson v. McLean* (1880) 5 C.P.D. 346.

(*h*) *Stevenson v. McLean* (1880) 5 C.P.D. 346.

(*i*) *Byrne v. Van Tienhoven* (1880) 5 Q.B.D. 344, citing *Tayloe v. Merchants' F. Ins. Co.* 9 How. (U.S.) 390; 54 Benjamin on Sales, p. 72 (7th Am. Ed.). According to Lindley, J., in the English case just cited, Pothier and some other writers have expressed the opinion that there can be no contract if an offer is withdrawn before it is accepted, although the withdrawal is not communicated to the person to whom the offer has been made. The reason assigned is that there is not in fact any such consent by both parties as is essential to constitute a contract between them.

Hence, where the person receiving the offer is notified, before the close of the period during which it is to remain open, that the person who made it has sold the property to a third party, he cannot afterwards make a binding contract by accepting the offer (*j*). And, in general, an effectual revocation may be implied from the owner's dealing with the subject-matter of the option in a manner inconsistent with a willingness to leave it open (*k*).

16. Relinquishment of rights under option.—The party having the option may assent to its withdrawal, and the offer is then at an end (*a*). When he has clearly abandoned his rights, the other party is not obliged to notify him that he considers the negotiations at an end, in order to obtain the right to sell the property (*b*).

IV. VALIDITY OF OPTIONS.

17. Requirements of the Statute of Frauds.—As the Statute of Frauds requires, in the case of contracts relating to land, that they shall be evidenced by a writing signed by the party to be charged, it follows that an option for the purchase of any interest in real estate is not enforceable unless the offer is put into writing. For a similar reason an oral agreement to extend the time for the acceptance of such an option is invalid (*c*).

18. Option obtained by fraud.—On principles of universal application, it is manifest that an option procured by false pretenses for purposes other than those stated is not enforceable (*d*).

19. Validity as dependent on the power to grant the option.—An administrator is a mere trustee whose primary duty is to sell the intestate's estate within a reasonable time, and, although he may in some cases execute an underlease, that is an exceptional mode of

(*j*) *Dickinson v. Dodds* (C.A. 1876) 2 Ch. D. 463.

(*k*) *Larmon v. Jordan* (1870) 56 Ill. 204.

(*a*) *O'Brien v. Boland* (1896) 16 Mass. 481. A purchaser with notice of the option who relies on the fact that it was abandoned by the agent of the party holding it must show that such agent had authority to make such abandonment. *Clark v. Gordon* (1891) 35 W. Va. 735.

(*b*) *Harton v. McKee* (1896) 73 Fed. 556.

(*c*) *Atlee v. Bartholomew* (1887) 69 Wis. 43; *Coleman v. Applegarth* (1887) 6 Am. St. Rep. 417, 68 Md. 1.

(*d*) *Collier v. Shepherd* (1892) 89 Va. 401 [refusing to sustain an action for damages].

dealing with the assets, and such a power cannot be construed, under any circumstances, as entitling him to insert an option of purchase in the lease (a).

In a lease under a power, a covenant to renew that lease at the expiration of the term is a good covenant, even though the first lease was for the full period authorized by the power, but when the time for carrying that covenant into effect arrives with the expiration of the first term it will not be enforced unless the rent and covenants stipulated for are the best rent and the proper covenants, when tested with reference to the conditions prevailing at that time (b).

An agent authorized to sell real estate at a specified price has no authority to give an option on it (c).

Under the English Lands Clauses Consolidation Act allowing railway companies to sell superfluous lands not required for their business, a sale reserving an option of re-purchase is ultra vires, as the Act requires an absolute sale (d).

20. Validity with reference to the rule against perpetuities.—Prima facie any grant of a privilege of acquiring an interest in land which is couched in such terms that to uphold it would have the effect of fettering the estate for an indefinite period is void under the rule against perpetuities.

On this ground the courts have refused to enforce a covenant to grant a lease to any one of the heirs of the lessee who should claim and make request within one year after the demised premises should become vacant (a), a covenant to re-convey to the trustees of a settlement in tail at any time during its continuance, although a tenant in tail may if he wishes bar the entail (b); an agreement by a railway company, in a conveyance of superfluous land not required for its line, to the effect that the grantee should, upon receiving six months' notice reconvey the land to it (c).

(a) *Oceanic &c. Co. v. Lutherbury* (C.A. 1880) 16 Ch.D. 236.

(b) *Gaslight, &c., Co. v. Towse*, 35 Ch. D. 519.

(c) *Field v. Small*, 17 Col. 386.

(d) *London, &c. R. Co. v. Gomm* (C.A. 1882) 20 Ch. D. 562.

(a) *Hope v. Mayor of Gloucester* (1855) 7 DeG. M. & G. 647.

(b) *Trevelyan v. Trevelyan* (1886) 53 L.T. 853, following *London &c. R. Co. v. Gomm*, 20 Ch. D. 562.

(c) *London &c. R. Co. v. Gomm* (1882) 20 Ch. D. 562, overruling *Birmingham Canal Co. v. Cartwright*, 11 Ch. D. 421.

But there is one noteworthy exception to this rule which is not easy to sustain upon principle. In the case of covenants for renewal in leases, while the courts lean against construing them to be for a perpetual renewal, unless it is perfectly clear that the covenant does mean it (*d*), the right to such a renewal will be enforced if it is granted in unequivocal terms (*e*).

21. How far options may be enforced apart from the rest of the contracts to which they are accessory.—That no effect can be given to an option apart from the other stipulations of a contract of which it forms a part is a necessary conclusion in any case, where the entire contract itself is invalid for any reason (*a*). So also it is plain that, if the right to exercise the option is declared in categorical terms to be dependant upon the existence of a certain relation between the parties at the particular time when the right is claimed, the option is necessarily lost whenever that relation is determined (*b*).

The general rule, however, is that, in the absence of some words indicating that the performance of the other stipulations was intended to be a condition precedent to the ultimate right to exercise the option, neither the essential invalidity of those stipu-

(*d*) *Baynham v. Guys Hospital* (1796) 3 Ves. 295; *Furnival v. Crew* (1744) 3 Atk. 83; *Moore v. Grant* (1801) 6 Ves. 236; *Pernette v. Clinch* (1855) 8 New Br. R. 217.

(*e*) *Earl of Shelburne v. Biddulph* (1748) 6 Bro. P.C. 356, 363; *Furnival v. Crew* (1744) 3 Atk. 83; *Brown v. Hitchcock* (1715) 5 Bro. P.C. 6. A detailed examination of cases dealing with this class of contracts would be foreign to the scope of the present article. Those who wish for further information on the subject are referred to Woodfall on Landlord and Tenant, chap. ix., and to the opinion of the court in *Bedell v. Rector*, 8 New Br. R. 217, which contains a resumé of an opinion by Mr. Hargrave, the eminent conveyancer.

(*a*) *Hallett v. Martin* (1882) 52 L.J. Ch. 804 [lease departed from power in a will is a matter not remediable under Act of 12 & 13 Vict.—option in it held void].

(*b*) Where the contract is that the lessee shall "have the option and privilege of purchasing the land at any time during the continuance of the term" the option is lost, where the term is forfeited for non-payment of rent before the end of the term. The lessee cannot obtain specific performance on the theory that the option continued during the period over which the lease was to extend, whether the term came to an end or not. *Coventry v. McLean* (1894) 21 Ont. App. 176, affirming 22 Ont. Rep. 7.

lations, nor the justifiable forfeiture of the rights bestowed by them, will entail the loss of the privileges obtained by the option (c).

V. RESPECTIVE INTERESTS OF THE PARTIES IN THE SUBJECT MATTER AFTER THE OPTION IS GRANTED.

22. Prior to the acceptance of the offer.—(a) *No interest created where no consideration passes.*—From the principle already stated (sec. 3, ante), that an unaccepted option not supported by a consideration creates no obligation on the side of the grantor, it follows that, where the right to exercise the privilege is expressly made contingent upon the payment of a certain sum within a specified period, no interest or estate vests in the grantee until that payment has been made (d).

(c) Where an agreement for the granting of a lease after the intending tenant has erected a house on a specified plot of ground contains a stipulation that he should insure the property in a certain office in the joint names of himself and the lessor, and should have an option of purchasing within a stated period, the contract for the lease is independent of the option to purchase, and the lessee may compel a transfer of the property, even though the right under the contract for the lease may have been forfeited by the fact that the insurance was not effected in the manner agreed, and there is an express stipulation that, if the intending lessee should not fully perform the agreement on his part, the agreement for executing the lease should be void. *Green v. Low* (1856) 22 Beav. 625, 4 W.R. 669, 2 Jur. N.S. 848 [injunction granted to restrain ejection]. Where an option to purchase is given to a party who, after erecting buildings on the property, is to be granted a lease for ninety-nine years and is reserved by a provision in the contract which is entirely independent of another stipulation which authorizes the owner to terminate the agreement if the works are not proceeded with forthwith, the fact that the right given by this latter stipulation has been exercised for good cause will not deprive the other party of a right to purchase which he has acquired by a declaration of his intention to purchase, made prior to the time when he was notified of the determination of the leasing parts of the agreement. *Raffety v. Scholefield* (1897) 1 Ch. 937 [refusing an injunction to restrain the party having the option from trespassing on the premises]. Where a lessee covenants to sink an oil well to a certain depth on the leased premises within a stated number of months, and is given the option of purchasing at any time during the term any five acres of the land they might select, and also the option of purchasing the residue of the land at the end of the term, the completion of the well is not a condition precedent to the exercise of the right of purchasing the five acres; for under such a contract the option may be declared the very day after the execution of the lease. The lessee, therefore, is entitled to specific performance of the contract, so far as this portion of it is concerned, although, owing to an accident to the machinery and from no fault of his own, he does not complete the well before the end of the term. *Hunt v. Spencer* (1867) 13 Grant (U.C.) 225. Where a lessor has the option of renewing on certain terms, or entering upon paying for improvements, the mere fact that the provision as to renewal may be illegal will not invalidate the obligations arising from the alternative stipulation. *Bedell v. Rector* (1855) 8 N.B.R. 217.

(d) *Richardson v. Hardwick* (1882) 106 U.S. 252; *Stembridge v. Stembridge* (1888) 87 Ky. 91. Where a partner's option to purchase a co-partner's share is lost by the expiration of the period allowed for its exercise, any land which may belong to the partnership retains its original character, as real estate, and descends to the heir. *Cookson v. Cookson*, 8 Sim. 529.

(b) ——— or until the terms are definitely arranged.—Where the negotiations have merely reached a stage at which an option is given to purchase within a specified period on certain terms and conditions, to be reduced to writing at the time of the purchase, the party receiving the option obtains no interest, legal or equitable, in the land (a).

(c) *Option on consideration creates interest recognized by equity.*—That the grant of an option upon consideration creates an equitable interest in the subject-matter is well settled.

"A person exercising the option has to do two things—he has to give notice of his intention to purchase, and to pay the purchase-money, but, as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land" (b).

(d) ——— but not in law.—As an option, supported by a consideration, or under seal, constitutes a contract which binds the grantor, he may be sued for its breach (c).

But the interest created under such circumstances being essentially equitable in its nature, does not furnish a sufficient basis for any rights which pre-suppose the possession of a legal estate in the subject-matter.

Thus the interest in property acquired by an option does not pass under the statutable short form of mortgage used in Ontario, containing no recitals, but merely a covenant that the mortgagor is seised in fee simple (d)

(a) *Bostwick v. Hess* (1875) 80 Ill. 138.

(b) Jessel, M.R., in *London, &c., R. Co. v. Gomm* (C.A. 1882) 20 Ch. D. 562. To the same effect see *Kerr v. Day* (1850) 53 Am. Dec. 526, 14 Pa. 112. That the option of a tenant to take a lease for one of various specified periods, is an "interest in lands" within the meaning of sec. 112 of the English Bankruptcy Act, was held in *Buckland v. Papellon* (1866) L.R. 2 Ch. 67. An interest of one-sixth in an option is a sufficient and legal consideration for a note, wherever law and equity are fused. *Hanna v. Ingram* (1890) 93 Ala. 482.

(c) *Cherry v. Smith* (1842) 3 Humph. 19, 39 Am. Dec. 150; *Collier v. Shepherd* (1892) 89 Va. 401. Where a person owning several parcels of property covenants, on a lease of one of them, that, if he, his heirs or assigns, should, during the term, have any advantageous offer for an adjoining parcel, he, his heirs or assigns, should not dispose of the same without previously making an offer of it to the lessee, it is not a breach of the covenant to sell the entire property, including both the demised land and the adjoining parcel, for an entire consideration in one entire contract, without offering the parcel to the covenantee. *Collison v. Lettson* (1815) 6 Taunt. 224 [no opinion reported].

(d) *Nevitt v. McMurray* (1886) 14 Ont. App. 126, per Hagarty C.J.D. (p.131).

So one who has been granted an option to purchase and subsequently entered the premises under a lease has no interest in the land except as lessee (c).

So it has been held that an unaccepted option is not such an interest as can be sold on execution (d).

(e) *Rights of the parties as regards the benefits of insurance on the property covered by the option.*—It has been held by an American court that an option of purchase given by a lease creates an interest in the premises of such a description that, so far as regards the right to the benefit of insurance moneys received for damages accruing before the exercise of the option, the lessee, after he has exercised the option, is regarded as the owner ab initio (a). For English judges, on the other hand, the controlling considerations under these circumstances have been that a contract of insurance is a mere personal contract for the payment of money, not a contract which runs with the land, and that it is only after a mutually obligatory contract of sale has come into existence that a vendor becomes a trustee for the purchaser as to the benefits accruing from the land. The conclusion arrived at, therefore, has been that, where the insurance on a building contracted to be sold is not mentioned in the agreement of sale, and the building is burnt down before the time fixed for the completion of the contract, the vendee is not entitled to have the policy moneys applied in payment of the purchase money (b). Accordingly, to entitle the holder of an option to have the proceeds of an insurance on the subject-matter applied to the payment of the purchase-price, there must be some special stipulation in the contract from which it may be inferred that this was the intention of the parties (c).

(c) *Mers v. Franklin Ins. Co.* (1878) 68 Mo. 127 [insurance policy avoided because lessee had not stated that he had a mere leasehold interest].

(d) *Provident Life, &c., Co. v. Mills* (1899) 91 Fed. 435.

(a) *Peoples &c. Co. v. Spencer* (1893) 36 Am. St. Rep. 22.

(b) *Rayner v. Preston* (C.A. 1881) 18 Ch. D. p. 11.

(c) No contract to hold the proceeds of an insurance policy of £14,000 for the benefit of a tenant having an option to purchase can be implied where, although the lessor agreed to insure, there was no stipulation with regard to the insurance moneys except in one contingency, viz., where there should be a fire causing damage of less than £4,000, in which case the term was to continue, and the lessor was to lay out the moneys received under the insurance in restoring the premises, while if the damage should exceed £4,000, the term was to cease, *Edwards v. West* (1878) 7 Ch. D. 858. Fry, J. distinguished the earlier case of

23. **After the option is exercised.**—The general principle upon which courts of equity adjust the rights of the parties is that the one to whom the option is granted becomes, after exercising it, the equitable owner of the interest to which it relates (a). One of the consequences of this doctrine is that, after an option on land has been exercised, the purchase-money becomes part of the personal estate of the vendor (b), a theory which, in cases where the owner of the property has deceased before the exercise of the option, has been pushed to the extent of holding that, under some circumstances, the equitable conversion shall be regarded as taking place at the time when the death took place. In other words, where there is a contract giving an option of purchase of real estate, and the option is not exercised till after the death of the person who created the option, the proceeds of the sale go as part of his personal estate and not as part of his real estate (c). This doctrine

Reynard v. Arnold, L R. 10 Ch. 386. There a lessee who had an option to purchase covenanted to insure in the sum of £800 and it was agreed that the money recovered under that insurance should be applied in reinstating the premises. The lessee insured in one office, and the lessor, without the lessees' knowledge, in another office. In both policies were the usual average clauses, so that, the property being destroyed by fire, only half the amount of the lessees' insurance was recovered by him. It was held that the lessor could be compelled to apply the proceeds of his policy also to the reinstatement of the premises.

(a) *Rafferty v. Scholfield* (1897) 1 Ch. 937; *Frick's Appeal* (1882) 101 Pa. 485 [holder of option held entitled to surplus of proceeds of judicial sale.]

(b) *Lord Lilford v. Powy's Keck* (1862) 30 Beav. 295 [purchase ordered at the instance of the heir to be completed out of the decedent's personal estate]; *Forbes v. Connolly* (1857) 5 Grant (U.C.) 657.

(c) The case by which this doctrine was established was *Lawes v. Bennett*, 1 Cox 167, the authority of which has been recognized, though with many doubts as to its soundness, in the later decisions cited below. In *Townley v. Bedwell* (1808) 14 Ves. 591, it was held that prior to the exercise of such an option the rents of the demised premises belonged to the heir. In *Collingwood v. Row* (1857) 3 Jur. N.S. 785, it was held that the effect of the exercise of an option of purchase by a lessee after the lessor's death was to convert the realty into personalty; but Kindersley V.C. adverted to the inconveniences which may result from the doctrine, since after the enjoyment of the property for many years by the deviser, the realty may, on the expression of the option, be converted into personalty, and not only converted, but the whole may be taken away and given to another. Where the substance of a will is simply that the real estate is to pass to certain persons and the personal property to other persons, and the real estate is subject to an option of purchase by the lessee, his heirs, or assigns, the produce of the land, until the option is exercised, goes to the devisees, and after that time becomes personalty. *Weeding v. Weeding* (1861) 1 J. & H. 424. Where the partnership articles give surviving members of the firm the option to purchase the interest of a deceased or retiring member in the real property of the firm, the money received is a part of the personal estate of the decedent. *Ripley v. Waterworth* (1802) 7 Ves. 425. This rule prevails, although most of it may have been paid in respect of the interest of the deceased in the real estate of the firm. *Townshend v. Devaynes*, cited in Lindley on Partnership p. 344. See also 11 Sim. 498, n. The rule is otherwise where a railway company with compulsory powers of purchase agrees

has been held applicable to cases of intestacy, and even though the option to purchase is exercisable only after the death of the grantor (*d*). But otherwise the courts have shown a decided disposition to confine it very strictly to its original limits. Thus where the option is not exercised until after the death of the party receiving the option, no retrospective effect is attributed to it and the contract only becomes binding when the option is exercised (*e*). Nor can the doctrine be construed, as between the vendor and the purchaser who claims under the option, in such a sense as to throw the conversion back to the date of the contract giving the option (*f*). The operation of the doctrine is still further circumscribed by a rule of testamentary construction which may be stated thus: Wherever, in a will made after a contract giving an option of purchase, the testator, knowing of the existence of the contract, devises the specific property which is the subject of the contract, without referring in any way to the contract he has entered into, there is considered to be sufficient indication of his intention to pass all the interest, whatever it may be, that he had in it (*g*).

VI. DURATION OF THE PRIVILEGE CONFERRED BY THE OPTION.

24. When the right to exercise the option first accrues.—Usually an option is open for acceptance from the moment it is offered ;

to pay for such lands within the limits of deviation as it should take. Here if a plot is taken after the death of the other party to the agreement, the purchase-money belongs to the persons entitled to the real estate. In *re Walker's Estate* (1852) 17 Jur. 706, distinguishing other cases on the ground that the contract was not an agreement to take but an agreement fixing the price of such lands as they might take by virtue of the statutory rights.

(*d*) *Isaacs v. Reginall* (1894) 3 Ch. D. 506.

(*e*) *Re Adams &c.* (C.A. 1884) 27 Ch. D. 394.

(*f*) *Isaacs v. Reginall* (1894) 3 Ch. D. 506; *Edwards v. West* (1878) 7 Ch. D. 858, per Fry J. In the latter case the contention was that the option of purchase in a lease made the lessee the owner in equity of the premises demised in such a sense that the lessor was his trustee in respect to the fruits of the property—in this case moneys recovered on an insurance policy for a loss by fire. It was held, however, that there be no equitable conversion except where there is a right specifically enforceable, and, in the case of an option, this situation supervenes only when the option is exercised.

(*g*) *Emuss v. Smith* (1861) 1 J. & H. 424; *Drant v. Vause* (1842) 1 Y. & C. 580. Where a testator has, by his will, specifically devised certain freeholds and subsequently, on the same day executes both a codicil in which, although he does not refer in terms to those freeholds, he expressly confirms his will, and also a lease of the freeholds with an option of purchase, it will be presumed that it was his intention that, if the option is exercised after his death, the purchase-money should pass to the specific devisee. It is immaterial whether the codicil was executed before or after the lease, as under such circumstances it must have been present to his mind when he confirmed the will. *Pyle v. Pyle* (1895) 1 Ch. 724.

but, not infrequently, where it constitutes one of the terms of a contract which contemplates the existence of prolonged relations between the parties, the time when it is exercisable is expressly deferred to some future date. A common instance of such a postponement is a provision giving a lessee the right of purchase at the end of the term. Sometimes it becomes doubtful as a matter of construction, whether this limitation is intended to be absolute or is qualified by other words in the contract which may or may not imply an alternative right to an earlier exercise of the option (*a*).

Other illustrations of a similar postponement are furnished by those clauses in partnership articles which give the continuing partners the refusal of the share of a retiring partner (*b*).

Other cases of deferred options turn on testamentary provisions allowing designated persons the right of pre-emption as to portions of the estate (*c*). The time limited will in no case begin to run against the privileged party until the terms of the offer, if not fixed by the will, have been settled in the manner prescribed, and he has been duly informed thereof (*d*).

25. When the right expires.—(See also secs. 39, et seq., post.) In the majority of cases the date at which the option expires is

(*a*) It has been held that, under a contract by which a lessee is to have "the choice of purchasing the property at a sum not exceeding £4000 at the end of the term, or sooner, if the vendor should wish to dispose of it," the condition in the last clause did not relate solely to the words "or sooner," but extended to the option, so that the lessee might, if he wished, purchase before the end of the term. *Collingwood v. Row* (1857) 3 Jur. N.S. 785.

(*b*) Where articles provide that a partnership shall last five years' unless previously dissolved by consent, and that, if any partner desires to withdraw after the close of one year from the date of the instrument; he shall give the others the refusal of his share and not sell except to an approved person, the inference is that a partner wishing to retire cannot exercise his option until at least one year has elapsed, and that the exercise of his right is contingent upon all the contracting parties being alive when the fulfilment of the contract is claimed. Hence if one of the partners dies within a year, and the firm is thus dissolved, any advantage which the others might have obtained from the contract is lost, and their only remedy is a suit for an ordinary accounting. *Frank v. Beswick* (1878) 44 U.C. Q.B. 1.

(*c*) Where a testatrix gives a legal estate to her husband for life with remainder to trustees in fee for specified purposes, with a proviso that her eldest son should have the right of purchasing the premises by giving notice of his intention to the trustees at any time within twelve months after the decease of her husband, and then dies before her husband, what is meant is that the son is to have the option from the time the estate comes into the hands of the trustees, and the fact that she pre-deceased her husband will be treated as immaterial. *Evans v. Stratford* (1864) 10 Jur. N.S. 861 [right of pre-emption held still to subsist.]

(*d*) *Austin v. Tawney* (1867) L. R. Ch. 143; *Lord Lilford v. Keck* (1862) 30 Beav. 295.

fixed by the express terms of the offer, and the inference will then be that the right to exercise it is a continuing one of the benefit of which nothing but the lapse of the prescribed period can deprive the party to whom it is given (*a*).

Where no time is specified, an offer is deemed to remain open for a reasonable time (*b*), and under such circumstances, unless the offer is accepted and acted upon within a reasonable time it must be treated as abandoned (*c*).

In cases of continuing relations like those created by leases and partnerships it is commonly provided, as already mentioned, that the option shall be exercised at the conclusion of the period during which the relation is to continue. Such a provision, it would seem, is construed liberally in favour of the party having the option (*d*). If a prolongation of the relations has occurred by the mutual consent of the parties, the presumption will perhaps usually be indulged that the option is intended to be still kept alive (*e*). And it is explicitly laid down that, if granted in general words, the option of a tenant to take a lease is retained as long as he continues to be tenant with the sanction of his landlord, and does not expire at the end of the term originally contracted for (*f*).

(*a*) Where one company assumes the control of the business and property of another, the consideration being that the first company shall provide for a mortgage debt of the former, and pay interest on its shares, and, as a part of the transaction, the transferee company obtains the option of becoming absolute owners of the property, provided they shall on or before any 25th of December, give the transferee company notice of their desire to avail themselves of the option, the transferee company does not forfeit its rights under the option because it gives the prescribed notice in a particular year and is unable to carry out the purchase owing to its want of funds. *Ward v. Wolverhampton &c. Co.* 41 L. J. Ch. 308; S. R. 13 Eq. 243.

(*b*) *Stone v. Harmon* (1884) 31 Minn. 512.

(*c*) *Williams v. Williams* (1853) 17 Beav. 213, [specific performance denied after a delay of five years in completing a contract for the sale of land.] If the contract has been reduced to writing, it is for the Court to determine, as a matter of law, what is a reasonable time. *Stone v. Harmon* (1884) 31 Minn. 512.

(*d*) Where a person enters into an agreement for a lease by which the lessor stipulates, when requested, to renew the term at its expiration, and no time is mentioned within which the option is to be exercised, the renewal may be demanded after the end of the term, unless the landlord calls upon him to carry out the contract, and the lessee makes default. *Moss v. Barton* (1873) L.R. 1 Eq. 474, 35 Beav. 195.

(*e*) It has been implied, though not expressly decided in one case, that, where a partnership is continued after the term originally agreed on is finished, an option given to the survivor by the articles to purchase the property remains in force. *Essex v. Essex* (1855) 20 Beav. 442.

(*f*) *Buckland v. Papillon* (1866) L.R. 2 Ch. 67, aff. g.; 1 Eq. 477.

In other cases the question when the right expires resolves itself into the question from what time the period limited for the exercise of the right begins to run. See preceding section, *ad finem*.

26. Death of party making the offer, effect of.—It was strongly doubted by Lord Romilly whether a contract which gives a right of pre-emption "at all times hereafter" could be enforced after the death of the owner. (Compare sec. 19, *ante*.) But he was convinced that it^a could not bear this meaning where it was contemporaneous with another which distinctly provided that the right to purchase should only be exercised "in case the owner should wish to sell." The second agreement, he considered, did not enlarge or extend the meaning of the first, as it was absurd to suppose that any person should be desirous of selling property at an indefinitely distant period for the same price (*a*). In the case of an ordinary offer the rule is clear. "It is admitted law that if a man who makes an offer dies, the offer cannot be accepted after he is dead" (*b*).

27. Right of grantor of option to abridge the period for its exercise.—The terms of a contract of which an option forms a part may be such that the existence of a right on the part of the giver to demand that the privilege shall be exercised before a specified date or be forever lost is necessarily implied. Thus, under a contract giving a yearly tenant the right, if he wishes for a lease, to have it granted "for seven, fourteen, or twenty-one years, at the same rent," it is at any time competent for the lessor or his vendee to call upon the tenant to exercise his option, and, if it is not exercised, to determine the tenancy (*c*). The same rule holds when a lessee has an option of purchase (*d*).

VII. WHAT PERSONS BESIDES THE IMMEDIATE GRANTEEES ARE ENTITLED TO CLAIM THE BENEFIT OF OPTIONS.

28. Rights of a partner in an option.—Where two persons enter into an agreement to purchase land on speculation, the arrangement being that one of them is to pay the expenses of the other

(a) *Stocker v. Dean* (1852) 16 Beav. 161.

(b) *Dickinson v. Dodds* (C.A. 1876) 2 Ch. D. 463, per Mellish, L.J., p. 475.

(c) *Heisy v. Giblett* (1854) 18 Beav. 174.

(d) *Schroeder v. Gemeinder* (1875) 10 Nev. 355.

while he is engaged in negotiating with the owner, the former is entitled to share in the profits derived from any option which the latter may procure upon the property, whether those profits accrue as a result of the exercise of the option during the period originally covered by it, or were realized during a period over which was subsequently extended by the vendor (*a*).

29. Parties specially designated in instruments.—Where a will directs that a certain person, or whoever shall, after the testator's decease, be entitled to an estate in settlement, may have the refusal of a piece of property, one who is a tenant for life of a part of the property, not under the settlement, but under a recovery, does not answer the description so as to be entitled to exercise this right of pre-emption (*b*).

30. Heirs of grantees of options.—The cases in which the instrument granting the option confers the right to exercise it upon the heirs of the grantee present no difficulty. Thus where a lease for years contains a stipulation permitting the lessee, his heirs, and assigns, to purchase at any time during the term, the right to purchase goes to the heir-at-law, and not to the personal representative, after the death of the lessee (*c*).

Whether an option, supported by a consideration, but not granted in terms to heirs, would come under a like rule is a question which has apparently not been discussed by the English or Canadian Courts. It might perhaps be argued that, although such an option creates an immediate equitable interest, which should in regular course descend to the heir, the principle of the cases cited below, as to options granted by wills, has been laid down in sufficiently general terms to warrant the conclusion that the heir would, at all events, not be permitted to require the payment of the purchase-price out of the personal estate.

By some American Courts the broad ground has been taken that an option which amounts to nothing more than a simple privilege to purchase an estate at any time within a specified period, and does not extend by its express terms to heirs or representatives, creates a purely personal right

(*a*) *Tupper v. Armand* (1889) 16 Can. S.C. 718.

(*b*) *Lord Radnor v. Shafto* (1805) 11 Ves. 448.

(*c*) *Henrihan v. Gallagher* (1862) 9 Grant (U.C.) 488, aff'd E. & A. 338, overruling *Sampson v. McArthur*, 8 Grant 72, in so far as that was a decision that an option of purchase in a lease was personalty.

which is determined by the death of the party to whom the privilege is granted, and is neither a chose in action, nor a transmissible right of property (*b*). Unless this doctrine is merely a succinct form of stating the results of the English cases between the heirs and personal representatives, (*c*) it is difficult to understand upon what ground this purely personal quality is predicated. It can scarcely be intended to rest upon the presumption that, in the absence of words to the contrary, the grantor of an option must be taken to have wished to restrict the right of purchasing to the grantee designated. Such a presumption would be essentially futile in face of the fact that every vendor must be taken to appreciate the possibility of his property passing to some third party at any moment after the transfer to the vendee, whether it be by the death of the latter, or a re-sale.

As respects testamentary options, it has been laid down that, if a testator goes no further than to provide that an estate shall be offered to a particular person at a price to be fixed by his trustees, and that person does not act in his lifetime, signifying what he will do, the interest he has lasts no longer than his life, and will not descend to his real representative to be paid for by his personal estate (*d*). One of the reasons assigned for this doctrine is thus stated in a well-known treatise :

"The heir or devisee has no right to insist on the completion of a purchase, except where the contract is such as might have been enforced against his ancestor or testator ; for otherwise he would be able to take the purchase money from the personal estate, in order to purchase for himself that which his ancestor was not bound to purchase, and perhaps never would have purchased " (*e*).

31. Administrators.— In the Rhode Island case, cited under the preceding section, the administrator was held, equally with the heir, and for the same reason, to be incapable of exercising the option, but in Michigan it has been laid down that the equitable

(*b*) *Newton v. Newton* (1876) 23 Am. Rep. 476 ; 11 R.J. 390 [bill to enforce sale] ; *Sutherland v. Parkins* (1874) 75 Ill. 338 [bill to enforce sale] ; *Gustin v. Union &c., District* (1893) 34 Am. St. Rep. 361, 94 Mich. 502.

(*c*) In the Rhode Island case cited the court laid some stress upon this aspect of the matter, but it does not appear to be the controlling consideration.

(*d*) *Lord Radmor v. Shafto* (1805) 11 Ves. 448, 454. Lord Eldon accordingly decided that there was no one who was capable of exercising the right of pre-emption, but suggested that, possibly, if there were a recital in his will that he offered such price as the trustees would dispose at, in other words, a reasonable price, and that he would accept the property on those terms, the estate might possibly pass by the devise.

(*e*) Fry Spec. Perf., sec. 218 ; see also *Brown v. Monck*, 10 Ves. 597.

interest acquired by an option of a lessee to purchase passes to his administrator, by whom and by his assignees the option may be enforced (*a*).

The effect of a stipulation in which administrators are expressly mentioned as among the parties in whose favour the option is created was recently considered by the English Court of Appeal in a case involving the effect of a clause in a lease, by which the lessor covenanted with the lessee, his executors, administrators, or assigns, that if the lessee, his executors, administrators, or assigns, should at any time thereafter be desirous of purchasing the fee simple of the demised land, and should give notice in writing to the lessor, his heirs or assigns, then the lessor, his heirs or assigns would accept £1200 for the purchase of the fee simple, and on the receipt thereof would convey the fee simple to the lessee, his heirs or assigns, as he or they should direct. After the death of the lessee, intestate, his heir, who was also the administrator of his personal estate, called on and received from the lessor's devisee a conveyance of the premises. The heir afterwards contracted to sell a portion of this property, and a question arose as to the parties by whom the deed should be signed in order to convey a good title. The Lords Justices, emphasizing the fact that they were merely construing the words of the particular covenant, held: (1) that the lessee having died intestate, the proper person to exercise the option was his administrator, and not the heir-at-law; (2) that the right of option, as one of the provisions contained in the lease, passed with the leasehold estate to the administrator upon his taking out administration to the intestate, and that he alone was capable of exercising the option; (3) that the word "assigns" in the covenant meant assigns of the leasehold interest. An argument advanced to sustain the view that a deed signed by the heir alone was sufficient was that the introduction of the word "heirs" in the clause relating to the conveyance (see *supra*) involved the consequence that he was entitled to buy and keep the fee himself. This contention was rejected, and the position taken that, if the administrator was also the heir-at-law, it was in his former capacity only that he had a right to exercise the option, under such a covenant. As the benefit to be derived from such exercise was for the benefit of the next of kin, a good title to the property could not be made unless the next of kin joined in the sale (*b*).

32. Assignees.—(*a*) *At law*.—Under common law principles, the question whether a covenant in a lease granting an option of purchase is assignable depends upon whether it runs with the term.

(*a*) *Gustin v. Union, &c., Distr.* (1893) 94 Mich. 502; 34 Am. St. Rep. 361.

(*b*) *Re Adams, &c.*, (C.A. 1884) 27 Ch. D. 394.

To this category belongs a covenant which gives the lessee the privilege of purchasing the demised premises themselves (*a*); and its benefit passes to the assignees of the tenant, unless there is a clear and unmistakable reservation of the privilege in the assignment (*b*). On the other hand, a covenant to the effect that the assigns, as well as the lessee, shall have the option of purchasing a parcel of land adjoining the demised premises, if an offer is made for it by a third party, does not run with the land, for the reason that it is to do a thing collateral to the demised premises (*c*).

The grantee of a reversion of lands leased for a term of lives, with a covenant for perpetual renewal, cannot take advantage of a condition in the lease that, if the lessee should be desirous of alienating his interest, the lessor should be given the preference, upon paying the same as another bona fide purchaser, and that, in case of alienation by the lessee, without his giving the lessor the preference, the lease should cease and determine. Such a condition is merely collateral (*d*).

The effect of the rule in *Dumpro's Case* (*e*) is that neither a lessor of lands with a covenant for perpetual renewal, nor a party to whom he assigns the reversion, is entitled, after purchasing a portion of the tenant's interest, to enforce the covenant as to the residue of the property. Hence a party who afterwards contracts to purchase that residue cannot object to the title on the ground that the right of renewal still encumbers the land (*f*).

(*b*) *In equity*.—It seems clear, both upon principle and authority, that an option supported by a consideration may be enforced by assignees, especially after the conditions precedent have been duly performed (*g*).

Thus an assignment may be made of a tenant's option to purchase (*h*). So an option to take a lease for another term is assignable, unless it is expressly declared in the agreement that he shall not be at liberty to assign (*i*).

(*a*) *Albert Brick, &c., Co. v. Nelson* (1888) 27 New Br. R. 276 [immaterial that assignees were not named in covenant].

(*b*) *Laffan v. Naglee* (1858) 9 Cal. 662, 70 Am. Dec. 678.

(*c*) *Collism v. Lettsom* (1815) 6 Taunt. 224, citing *Mayor of Congleton v. Patterson*, (1808) 10 East. 130.

(*d*) *Sparrow v. Cooper* (1833) Hay & J. 204.

(*e*) 4 Coke 119, (b).

(*f*) *Sparrow v. Cooper* (1833) Hay & J. 404.

(*g*) *Perkins v. Hasdell* (1869) 50 Ill. 216.

(*h*) *Napier v. Darlington* (1871) 70 Pa. 64; citing *Kerr v. Day* (1850) 53 Am. Dec. 526, 14 Pa. 112; *House v. Jackson* (1893) 24 Or. 89; *Contra, Menger v. Ward*, 87 Tex. 622.

(*i*) *Buckland v. Papillon* (1866) L.R. 2 Ch. 67 [here the option was declared to pass to the assignee in bankruptcy].

So also one who has the privilege of selling all the produce of a certain kind which his land may yield during a specified term of years may assign his right to the purchaser of the land (*j*).

The grantee of an option does not, by assigning it, estop himself from exercising a right which he has expressly reserved to withdraw from the contract (*k*).

VIII. TO WHAT EXTENT THIRD PERSONS ARE BOUND BY THE EXISTENCE OF THE OPTION.

33. Parties acquiring the subject-matter of the option by testamentary provisions.—A covenant by a lessor to renew or pay for the improvements runs with the land and binds his devisee (*a*).

34. Subsequent purchasers.—(*a*) *At law*.—At law a purchaser of land affected by an option is bound by it, wherever it falls under the category of covenants running with the land. Thus an option of re-purchase binds the land in the hands of any person to whom it may pass (*b*). So covenants for the perpetual renewal of leases, being regarded as real agreements, affect the legal interest of all who take the estate with notice of them (*c*).

(*b*) *In equity*.—The granting of an option, not supported by a consideration, does not, for reasons which will be obvious, by referring to sec. 21 ante, create a right which will prevail against the interest of a subsequent purchaser. In a court of equity the same principle will of course prevail, where the consideration was merely nominal, and did not really pass (*d*). In such cases, the mere fact that a third person knows that the offer purports to be open till a date fixed will not prevent him from making a better offer (*e*).

(*j*) *LaRue v. Groesinger* (1890) 18 Am. St. Rep. 179; 84 Cal. 281 [decided with special reference to Cal. Civ. Code, secs. 1044, 1458, 1459, which virtually embody the rules of courts of equity as to assignments].

(*k*) *Clark v. Harman*, 9 D.C. 1.

(*a*) *Irvin v. Simonds* (1864) 11 New Br. R. 190.

(*b*) *London &c. R. Co. v. Gomm* (C.A. 1882) 20 Ch. D. 562.

(*c*) *Earl of Shelburne v. Bidolph* 6 Bas. P.C. 356, 363. But a covenant for perpetual renewal, entered into by a person holding a limited interest in lands does not bind the estate beyond that interest. Hence, if his assignee acquires the inheritance, it is not bound by the covenant. *Brereton v. Twohey* (1858) 8 Jur. Com. L. 190.

(*d*) *Graybill v. Brugh* (1893) 89 Va. 895, 37 Am. St. Rep. 894.

(*e*) *Dickinson v. Dodds* (C.A. 1876) 2 Ch. D. 463, per Mellish L.J., p. 474.

On the other hand it is equally well settled that an option granted on a real consideration creates a substantial interest in the subject-matter, to which the rights of a subsequent purchaser who has notice of its existence are postponed in equity (*e*).

The possession of a tenant is constructive notice to one dealing with the landlord of the actual interest such tenant may have in the land, such as the rights acquired under an option to purchase within a given period (*f*), or to renew the term (*g*).

35. Creditors of the party giving the option.—As against creditors of the owner, having constructive notice of the option, the equitable interest of the holder of the option relates back to the date of the contract; and, wherever a contract giving an election to purchase has been registered, such creditors are put upon inquiry whether election has been exercised (*h*).

36. Wife of party granting the option.—A married woman is in no way bound by an option granted by her husband on her lands, where she was not a party to the transaction, and protested against it from the first moment that it came to her knowledge (*i*).

IX. NECESSITY FOR THE PERFORMANCE OF THE PRESCRIBED CONDITIONS BY THE GRANTEE OF THE OPTION.

37. Strict performance of conditions usually a pre-requisite to securing the benefits of an option.—The terms upon which options are granted are commonly such as to bring them within the general principle thus laid down by Lord Westbury:

“If it be clear that any particular act is a condition precedent, it is immaterial whether it be or be not reasonable to require that it be first done on the one side before any obligation arises on the other. The things required must be done in the order and sequence which are stipulated.” (*j*).

It follows, therefore, that the holder of an option will, in the great majority of instances, be unable to enforce the inchoate

(*e*) *Hersey v. Giblett* (1854) 18 Beav. 174 [tenant from year had an option to receive a lease upon demand]; *Ross v. Parks* (1890) 93 Ala. 153, 30 Am. St. Rep. 47, 11 L.R.A. 148; *Barrett v. McAllister* (1890) 33 W. Va. 738; *Clark v. Gordon* (1891) 35 W. Va. 735; *Jackson v. Groat* (1827) 7 Cow. (N.Y.) 285.

(*f*) *Daniels v. Dawson* (1809) 16 Ves. 253; *Kerr v. Day* (1850) 14 Pa. 112, 53 Am. Dec. 526.

(*g*) *Blackwell v. Smyly* (1866) 3 W.W. & A'B. (Vict. Eq.) 1.

(*h*) *Donnally v. Parker* (1872) 5 W. Va. 301.

(*i*) *Graybill v. Brugh* (1893) 37 Am. St. Rep. 874, 89 Va. 895.

(*j*) *Weston v. Collins* (1865) 5 N.R. 345, 34 L.J. Ch. 353.

rights conferred by it, either in a legal or an equitable suit, unless he strictly fulfills all the conditions to which the undertaking of the grantor was expressly made subject by the provisions of the contract.

In practice it has happened that, for reasons which are sufficiently obvious in view of the usual subject-matter of these contracts and the nature of their provisions, this principle has ordinarily been applied in suits for specific performance, (see XI, post) which is refused, unless it is apparent that the condition which was not fulfilled was not intended to be of the essence of the contract (*b*), or unless, owing to no default on the part of the grantee of the option, it was impossible to fulfill those conditions (*c*).

Where "the covenantor cannot enforce a sale, but it is entirely in the option of the covenantee whether he will purchase or not, and where he is at liberty to exercise his option only upon the performance of certain specified terms, the contract rests upon a wholly different footing from an ordinary contract for the sale and purchase of land, and a party entitled to purchase or not at his option must shew that he has performed all the terms, upon the performance of which alone he is entitled to exercise that option" (*d*).

38. Conditions considered without reference to the time fixed for performance.—Subjoined are some decisions in which the general principle stated alone has been applied without any special reference to the requirement that the act specified shall be done within a certain period.

(*a*) *Payment of purchase price.* (See also sec. 42, *infra*)

If the proviso is that the grantee of an annuity will accept a specified sum for it within a specified period after the grantor, his heirs, etc., shall give notice of his desire to re-purchase it, the annuity is not extinguished unless a regular notice is given and payment actually made according to the notice (*e*).

(*b*) *Payment of rent by tenant with option to purchase or renew.*

As a general rule a tenant's stipulation to pay rent must be literally performed in order to entitle him to the specific performance of any

(*b*) *Joy v. Birch* (1836) 4 Cl. & F. 57 (p. 89); *Berwind v. Williams* (1895) 172 Pa. 1.

(*c*) *Ball v. Canada Co.* (1876) 24 Grant (U.C.) 281. See X, post.

(*d*) *Forbes v. Connolly* (1857) 5 Grant (U.C.) 657, per Spragge V.C.

(*e*) *Joy v. Birch* (1836) 4 Ch. V.F. 57, p. 89.

contract for the future disposition of the property in his interest (*b*). But an exception to this rule would seem to be admitted wherever the real consideration of the lease and the option was not the rent, but the improvements which the tenant was to make on the property (*c*).

(*c*) *Performance by tenant of covenants to repair and insure.*—Where the lessee covenants to keep the premises in repair, and is entitled to a renewal of the lease on giving six months' notice before the end of the term, he cannot enforce his right to the renewal, if the repairs were not completed either when the notice was given or when it expired (*d*). So also—although it was admitted to be a case of great hardship—where the lease contains the usual covenants to repair and insure, and also a covenant by the lessor that he would, provided the rent should have been paid and the covenants duly performed, procure from the lord of the manor, upon a request from the lessee in writing, a license to demise the premises for a further term, and so from time to time, provided such request should be given as aforesaid, and also that he would, on obtaining such license, grant a new lease with the same covenants, including the covenant for renewal, a court of equity will not relieve the lessee against a forfeiture of the privilege of renewal through the breach of the covenants to insure and repair, although the premises were only left uninsured a very short time, and the repairs were delayed in consequence of the landlord's objection to renew, and the lessee, who was the assignee of the original tenant, had expended large sums of money in erecting buildings on the property (*e*).

(*d*) *Furnishing of joint covenants by tenants with option to renew.*—Where there are two tenants to a lease who have entered into joint and several covenants, and his agreement is to grant the renewed lease to the two, subject to the same covenants, he is entitled to have the joint and several covenants of the two on the renewed lease. Hence if one of them becomes bankrupt having shortly before assigned his interest to the other,

(*b*) *Davis v. Thomas* (1831) 1 Russ. & M. 506; *Weston v. Collins* (1865) 5 N. R. 345 [covenant that there should be a conveyance, if the tenant should pay the arrears of rent]; In *Forbes v. Connolly* (1857) 5 Grant (U.C.) 657, specific performance was refused where a lessee had an option to purchase if he paid a stated sum and "performed and paid all the rents and covenants on his part to be performed" as set forth in the lease, and the rent had not been paid at the times stipulated. In another case relief was refused where the proviso was that "no default nor breach of covenant" should at any time have been made, and it was conceded that covenants as to payment of rent and taxes and cutting of timber had been broken. *Ball v. Canada Co.* (1876) 24 Grant (U.C.) 281.

(*c*) *Rawstone v. Bentley* (1793) 4 Bro. P.C. 415 [ejectment set aside where the rent reserved was nominal, and the land was vacant when the lessee entered, and had been already benefitted by the expenditure of £1000.]

(*d*) *Bastin v. Bidwell* (1881) 18 Ch. D. 238.

(*e*) *Job v. Banister* (1856) 2 Kay & J. 374.

the latter cannot compel the landlord to renew the lease as to himself alone (*f*).

(*e*) *Application for renewal of lease upon the occurrence of a specified event.*—The general rule is that a tenant for lives forfeits the right of renewal if he does not comply exactly with provisions of the lease as to applying for the insertion of a new life after the death of a *cestui que vie* (*g*). Similarly where the lessor and lessee, in contemplation of the tenancy's continuing for a long term, provide for several renewals at the end of periods reckoned, not by lives, but by years, the right of renewal will be treated as being forfeited forever by the lessee's neglect to make application after the expiration of the first of these periods, where, upon a reasonable construction of the instrument, the lessor must have intended to limit the privilege to this extent (*h*).

But it is otherwise where a lease for a long term provides that the tenant may procure another lease for the same term by applying at the expiration of specified shorter periods during the currency of the term. The option of renewal is then regarded as a privilege which recurs as often as the end of one of these periods comes round (*i*).

39. Time usually of the essence of optional contracts.—(See also sec. 38 (*f*), *supra*.)—"In ordinary contracts of purchase, both parties are at once bound, and unless there be some special circumstances, the time for payment of the purchase money or for the conveyance of the estate, is not deemed of the essence of the contract" (*a*). In the case of such contracts, therefore, the circumstance that the day fixed for the payment of the money and completion of the purchase has passed, does not ordinarily entitle either party to refuse to carry out the agreement (*b*). A different rule usually

(*f*) *Finch v. Underwood* (C.A. 1876) 2 Ch. D. 310, [right of renewal of lease was here expressly made to depend upon the lessee's having "duly observed and performed all the covenants of the lease."]

(*g*) *Bayley v. Leominster* (1792) 3 Bro. Ch. Cas. 529, 1 Ves. 476. [two lives had dropped before election to renew was declared]; *Baynham v. Guy's Hospital* (1769) 3 Ves. 295; *Eaton v. Lyon* (1798) 3 Ves 690; *Pernette v. Clinch* (1894) 26 N.S.R. 410.

(*h*) *Rubery v. Jervoise* (1786) 1 T.R. 229; *Nicholson v. Smith* (1882) 22 Ch. D. 640.

(*i*) *Bogg v. Midland R. Co.* L.R. 4 Eq. 310, 313, distinguishing *Eaton v. Lyon*, *supra*.

(*a*) *Weston v. Collins* (1865) 5 N.R. 345, 34 L.J. Ch. 353, per Ld. Westbury. As to the general principle upon which it is determined whether time is of the essence of the contract, see Dart's V. & P., 6th ed., pp. 482, et seq. As to the effect of the lapse of time generally, upon the right to obtain specific performance, see Fry's Spec. Perf. ch. XXV.

(*b*) *Ranelagh v. Melton* (1864) 2 Dr. & Sm. 278.

prevails in cases of the type under review. In these the controlling principle is that, wherever it is stipulated in effect that, provided the intending purchaser shall do a specified act, then the owner will convey the land, the relation of vendor and purchaser does not exist between the parties unless and until the act has been done as stipulated (*c*). Clearly that relation can never come into existence at all if any act upon which such existence is expressly made dependent has been left unperformed at the expiration of the period for which the offer holds good. *Mutatis mutandis*; a similar principle is applicable where the negotiation contemplates a transfer of interests, not amounting to a complete sale.

40. Option lost, if not accepted within period limited.—Accordingly in most cases of options, as such offers are ordinarily worded, the rights of the party to whom the offer is made are gone forever, unless he duly communicates the fact of his acceptance to the party making the offer before the period which the latter allowed for consideration has expired (*a*).

An acceptance is ordinarily deemed to be given in time if communicated at any time during the period specified in the contract for the duration of the option (*b*), even though the stipulation is for so many days' notice, and the period covered by the option may be so nearly ended when the notice is given that it will have completely expired before those days have elapsed (*c*). And if the

(*c*) *Ranelagh v. Melton* (1864) 2 Dr. & Sm. 278. In *Page v. Hughes* (1842) 2 B. Mons (Ky.) 439, it was said that time was generally essential for the reason that the contract was not mutual. But the consideration seems irrelevant. The question is merely one of the intention of the person making the offer.

(*a*) *Coleman v. Applegarth* (1887) 6 Am. St. Rep. 417, 68 Md. 21; *Maughlin v. Perry*, 35 Md. 352; *Weaver v. Burr* (1888) 31 W. Va. 736; *Dyer v. Duffy* (1894) 39 W. Va. 148; *Mason v. Payne* (1871) 47 Mo. 517; *Barrett v. McAllister* (1890) 33 W. Va. 738; *Schields v. Horbach* (1890) 30 Neb. 536; *Longworth v. Mitchell* (1875) 26 Ohio St. 334; *Atlee v. Bartholomew* (1887) 69 Wis. 43; *Magoffin v. Holt* (1863) 1 Duv. (Ky.) 95; and the cases cited in the following notes.

(*b*) *Shipman v. Grant*, 12 C. P. (Ont.) 395 [not necessary to give notice before the period begins]; *Brown v. Slee* (1880) 103 U.S. 828 [notice need not be given on the actual day a re-purchase is made under an option].

(*c*) *Guy v. Warren* (1898) 175 Ill. 328. It has been held, however, that a notice of so many days required to be given by a lessee having an option of purchase at any time within five years is too late, when it is only given two days before the term expires, *Mason v. Payne* (1871) 47 Mo. 517. A similar obligation may sometimes be created by the express terms of the option. Thus when the notice of the lessee's desire to purchase is to be one of six months expiring on one of the quarterly days appointed in the lease for the payment of rent, a notice given at such a time that before it has been running six months, the end of the term is reached, is out of time, and a sale will not be enforced. *Riddell v. Dumford* (1893) W. N. 30.

grantee of the option has until a stated day to accept the proposition, the period does not expire till the close of that day (*d*).

The inchoate rights given by an option lapse without notice or declaration of forfeiture from the party making the offer (*e*).

The lapse of the option involves also the forfeiture of any rights of third parties which may be contingent upon its acceptance (*f*).

41. Acceptance must be within reasonable time where none is particularized.—The general rule is that, where no time is expressly limited for the exercise of the option by the terms of the proposal, the other party must signify his acceptance of the offer within a reasonable time, or he will be treated as having declined it (*g*).

42. Payment of purchase price or other sums stipulated at the specified time.—Another consequence of the essentiality of time in most cases of optional contracts is that, in order to perfect his inchoate rights, the grantee of an option will ordinarily be obliged not merely to declare his acceptance of it within the period for which it holds good, but also, before that period expires, either actually pay (*a*), or make a proper tender of the

(*d*) *Houghwout v. Boisanbin* (1867) 18 N.J. Eq. 315.

(*e*) *Cookson v. Cookson*, 8 Sim. 529; *Pyke v. Northwood* (1838) Beav. 152; *City of London v. Melford* (1807) 14 Ves. 41; *Allen v. Hilton* (1738) Fonbl. Eq. 432; *Wentworth v. Hull & Co. R. W. Co.* (1891) 64 L.T. 190; *Barker v. Critser* (1886) 35 Kan. 459 [option cannot be revived where grantor acquires the subject matter after its lapse.]

(*f*) *Cummings v. Lake & Co.* (1893) 86 Wis. 382 [no claim for services where option is forfeited].

(*g*) *Fitzpatrick v. Woodruff* (1884) 96 N.Y. 561; *Hanly v. Watterson* (1894) 39 W. Va. 214; *Larmon v. Jordan* (1870) 56 Ill. 204 [offer of property of fluctuating value, like stocks, not presumed to hold good for twenty-seven days; *Chicago, &c., R. Co. v. Dane* (1870) 43 N.Y. 240 [proposal to carry merchandise within certain specified months]; *Carr v. Duval* (1840) 14 Pet. (U.S.) 70 [twenty days not a reasonable time for a reply, where answer by return post is asked for]; *Catlin v. Green* (1886) 5 N.Y. S.R. (Brooklyn City Ct.) 866 [nine years too long for a stockholder to delay exercising option to exchange stock for bonds]. Where one party in consideration of another promising to use his best efforts to sell the former's land for a certain price, binds himself to convey the property to the latter, his assigns, or appointee, whenever called upon to do so, the owner to remain in possession in the meantime, the holder of the option cannot, after so long a period as four years, when the property has greatly increased in value, compel a conveyance, unless he at least tenders the purchase money, or shows that his appointee has the means to pay it. *Kellow v. Jory* (1891) 141 Pa. 144.

(*a*) *Pegg v. Wisden* (1852) 16 Beav. 239; *Weston v. Collins* (1865) 5 N.R. 345; *Lord Ranelagh v. Melton* (1864) 2 Dr. & Sm. 278; *Brook v. Garrod* (1858) 2 De G. & J. 62; 3 K. & J. 62; *Burrit v. Sabine* (1684) 1 Vern. 268. See also to same effect *Nevitt v. McMurray* (1886) 14 Ont. App. 126; *Richardson v. Hardwick* (1882) 106 U.S. 252; *Kerr v. Purdy* (1872) 51 N.Y. 629, rev'g 50 Barb. 629; *Maughlin v. Perry* (1871) 35 Md. 352; *Hermann v. Conlon* (1897) 143 Mo. 369; *Clarno v.*

sum of money named as the price of the interest or estate to which the option relates (*b*); or—supposing the discharge of such a liability to have been expressly made a condition precedent to the right to demand a conveyance,—cancel some collateral debt, such as a mortgage on the property sold (*c*), or an outstanding note of the vendee himself for goods supplied by the vendor on some prior occasion (*d*).

In some early cases the doctrine seems to be laid down quite strongly that, where the right to renewal of a lease is made dependent upon the payment of fines at specified times, the court will not, in the absence of some special circumstance, assist the lessee where he has neglected to perform this condition (*e*); but in later rulings a distinction is taken between a mere omission to pay the fine, and wilful neglect or refusal to renew the lease. In the former case equity will relieve against the breach of the condition, in the latter specific performance will be denied (*f*). The failure to pay the fine during the currency of the term is of course not fatal to the right of renewal, where the provisions relating to the renewal are couched in terms which indicate that it was the intention of the parties that the fine was not to be paid until after the expiration of the old term (*g*).

Grayson, 3 Or. 111; *Bostwick v. Hess* (1875) 80 Ill. 138; *Stembridge v. Stembridge* (1888) 87 Ky. 91; *Weaver v. Burr* (1888) 31 W. Va. 736; *Clark v. Gordon* (1891) 35 W. Va. 735. "Where there is no stipulation for penalty or forfeiture, but a privilege is conferred, provided money be paid within a stated time, there the party claiming the privilege must show that the money was paid accordingly." *Davis v. Thomas* (1831) 1 Russ. & Myl. 506.

(*b*) *Dawson v. Dawson* (1837) 8 Sim. 346; *Carter v. Phillips* (1887) 144 Mass. 100; *Longfellow v. Moore* (1887) 102 Ill. 289. Even a tender of the money will not be sufficient, if the agreement distinctly contemplates a completion of the purchase before the end of the period. Thus, where one party pays a sum for an option to buy within so many days a piece of property for a specified price in cash, upon payment of which the owner is to make deed, the rights under the option are not saved by merely notifying the owner of an acceptance of the offer, and an offer to deposit such amount as might be required of him, pending examination of title. *Killough v. Lee* (1893) 2 Tex. Civ. App. 260.

(*c*) *Stembridge v. Stembridge* (1888) 87 Ky. 91.

(*d*) *Schiels v. Horbach* (1890) 30 Neb. 536.

(*e*) See House of Lords decisions cited in the judgment in *Lawstone v. Bentley* (1793) 4 Bro. P.C. 415.

(*f*) *Lennon v. Napper* (1807) 2 Sch. & L. 682; *Chesterman v. Mann* (1851) 9 Hare (1851) 9 Hare 206 [evidence showed that up to the time when the renewal was open under the terms of the lease, the lessee had temporized on merely colourable grounds about coming to a definite arrangement, and had no bona fide intention of renewing].

(*g*) *Nicholson v. Smith* (1882) 22 Ch. D. 640. The time with reference to which the question of an under-lessee's laches in failing to pay the fine which is due from him upon his obtaining a renewal of the lease is reckoned not from the latest time at which the mesne landlord might have procured a lease, but from the time when the under-lessee is called upon to contribute to the payment of the fine. *Chestermann v. Mann* (1851) 9 Hare 206.

Payment within the period covered by the option is, of course, not obligatory where it is not required to be so made (*h*). Sometimes this non-essentiality of time may be inferred from the terms of the contract (*i*); or it may be deduced from the acts of the grantor of the option (*j*).

An extension of the time given for payment by a contract so worded as to make time essential does not destroy the essentiality of the condition altogether, but payment on the further day named is obligatory (*k*).

Money paid on account of an ordinary purchase is recoverable, if the contract is not completed owing to no fault of the vendee's, but a different rule governs, where the contract provides for a forfeiture of the sum paid for an option, in case the purchase is not completed within the time limited (*l*).

43. Delay in completing the contract after acceptance, consequence of.—Any laches after a demand for a lease is made by a tenant from year to year will be taken strongly against the tenant; but a subsequent acceptance of rent will cure such a defect (*n*).

(*h*) *Watson v. Coast* (1891) 35 W. Va. 463.

(*i*) Where it was provided that the tenant should "have the option of any time during the term to purchase the premises for £3500, and, upon payment thereof to the lessor, the said term should cease, and the tenant should thereupon be entitled to an assignment, it was held that the contract of sale became complete when the tenant notified the lessor of his intention to purchase, and the payment of the purchase-money was not a condition precedent to the existence of a mutually obligatory agreement. *Mills v. Haywood* (C.A. 1877) 6 Ch. D. 198. Where a lessee has the right of purchasing at any time within a specified period by giving three months' notice, and notice is duly given, time will not be considered to be of the essence of the contract, so far as regards its completion of the contract by payment of the price. *Pegg v. Wisden* (1852) 16 Beav. 239. The general rule has been said to be, that time is not of the essence where the contract shows no intrinsic purpose which would be defeated by delay in payment of the price, and there is no condition that the contract shall be avoided by the failure to make payment at the time appointed. *Wilson v. Herbert* (1893) 76 Md. 489, where the court decreed a renewal of a lease, in spite of the failure of the lessee to pay the purchase price before the end of the term, where the stipulation was merely that the property would be conveyed for the price specified, provided the lessee paid the arrears of rent, and also any rent that might be due up to the end of the term.

(*j*) Time is not of the essence although a lease only gives the tenant the right to purchase at any time within a year from its date, where the tenant has held over with the landlord's consent after the expiration of the year and is still in possession when he elects to purchase. *O'Arras v. Keyer* (1856) 26 Pa. 289.

(*k*) *Barclay v. Messenger* (1874) 43 L.J. Ch. 449; 22 W.R. 522.

(*l*) *McConkey v. Peach Bottom &c., Co.* (1895) 68 Fed. 830.

(*a*) *Hersey v. Giblett* (1854) 18 Beav. 174. A tenant with an option to purchase who after giving notice of his intention to exercise his option, delays for five years to enforce the contract, cannot claim specific performance, especially where the subject-matter of the contract is of a somewhat speculative and fluctuating value, (in this case a tavern), *Mills v. Haywood* (C.A. 1877) 6 Ch. D. 198.

As a general rule, a purchaser in possession does not lose by delay his right to specific performance ; but the benefit of this principle cannot be claimed, where there is nothing to show that the lessor and his mortgagee recognized or were bound to recognize the possession of the tenant, after notice of intention to purchase, as being the possession of a purchaser under the contract for sale (*b*).

After the contract has become binding by the declaration of an intention to exercise the option, time cannot be made of the essence of the contract by a notice from the vendor to complete the purchase, unless the period fixed by the notice is a reasonable one; and the question of reasonableness must be determined at the date when the notice is given (*c*).

44. When non-performance of conditions is excused.—The terms on which a court of equity will relieve against the legal consequences of a non-performance of conditions were thus explained as regards one common kind of optional contracts, more than a century ago :

“Where the lessee has lost his legal right, he must prove some fraud on the part of the lessor, by which he was debarred the exercise of his right ; or some accident or misfortune on his own part, which he could not prevent, by means whereof he was disabled from applying for a renewal at the stated times, according to the terms of his lease.” (*d*)

But several other excepted cases are recognized in later decisions besides those here mentioned. The non-completion of the contract at the time stipulated will be excused, where the vendor repudiates the contract (*e*) ; or where there is a *bonâ fide* dispute as to the terms on which the option may be exercised, unless the omission to settle those terms can be attributed to the fault or default of the holder of the option (*f*) ; or where the grantee's failure to complete

(*b*) *Mills v. Haywood* (C.A. 1877) 6 Ch. D. 196.

(*c*) *Crawford v. Toogood* (1879) 13 Ch. D. 153; *Pegg v. Wisden* (1850) 16 Beav. 239.

(*d*) Lord Thurlow in *Bateman v. Murray* (1779), as quoted in *Rawstone v. Bentley* (1793) 4 Bro. P. C. 415.

(*e*) *Mansfield v. Hodgdon* (1888) 147 Mass. 304 [refusal to include in the conveyance portion of the land covered by the option.]

(*f*) *Hunter v. Hopetown* (1865) 13 L.T. (H.L.) 130, per Lord Kingsdown. There the actual point on which the decision turned was that a landlord, while a suit is pending in which he denies the relation of landlord and tenant, cannot justify his refusal to grant a new lease on the ground that the tenant should have treated the refused lease as granted, and that, if he desired a further renewal after the end of the period on which the lease so refused would have expired, he should have given notice of his desire for renewal twelve months before such expiration, as specified in the original instrument. In some cases, however, the

the contract is caused by the fact that the grantor was guilty of some default which rendered the completion impossible (*d*)—unless, as it seems, such default is in respect to one of the merely formal incidents of a transfer of a valuable interest (*e*)—; or where there is a postponement of the execution of the conveyance by the request of the grantor himself (*f*).

The situation of the party to whom the price is to be paid is also recognized as an excuse for the failure to complete a purchase within the time appointed (*g*).

Where the grantor of the option has ascertained the intention

existence of a controversy between the parties will not relieve the grantee of an option from the obligation of saving his rights provisionally by application to a court, *Mills v. Haywood* (C.A. 1877) 6 Ch. D. 198 [dispute arose as to proper form of conveyance of property to lessee with option of purchase, and mortgagee refused to join in the deed]; *Chesteman v. Mann* 9 Hare 206 [specific performance denied where the only ground on which a lessee with option of renewal refused to pay the fine demanded was that it was excessive].

(*d*) *Stathan v. Liverpool Docks Trustees* (1830) 3 Y. & J. 565; [grantor omitted to reduce to certainty, before the expiration of the period limited, the amount which the grantee was to pay]. Where the stipulation as to renewal presupposes the fixing of a valuation rent, the instrument declaring that, if this he made, then the new lease is to be executed; that, if the lease be not executed, the improvements are to be paid for; and that, if they are not paid for the lease is deemed to be renewed, but no provision is made for the contingency of a refusal by the lessor, his heirs, or assigns, to fix the valuation rent—the instrument will be construed as entitling the lessee to a renewal of the term, in case of the lessor's refusal both to fix the rent and to pay for the improvements. *Nudell v. Williams* (1864) 15 C.P. (Ont.) 348.

(*e*) The right of pre-emption given by a testator to his brother, if the purchase-money is paid within a period named, is lost by the non-fulfilment of the condition, although the solicitors of the trustees of the will have failed, upon request, to furnish an abstract of title, *Brook v. Garrod* (1858) 2 De G. & J. 62, 3 K. & J. 62. A lessee whose right of purchase is expressly made contingent on the price being paid during the currency of the term is not excused for his failure to pay it within the time stipulated by the fact that the lessor was unable, owing to his own neglect, to have a conveyance prepared before the expiration of the term, and that he will thus be obliged to pay the whole of the purchase-money before he can ascertain whether it is in the power of the lessor to make a good conveyance. *Weston v. Collins* (1865) 5 N.R. 345.

(*f*) *Ross v. Worsop* (1740) 1 Bro. P.C. 281 [renewal of lease decreed where application was made within period stipulated, and lessor, being about to start on a journey, and wished to defer signing the new lease till he returned].

(*g*) *Joy v. Birch* (1836) 4 Cl. & F. 57 (p. 89). It seems default in payment of purchase-money within the term as stipulated may be excused, where the owner is dead at the time the option is declared, and there is no personal representative to receive the money. *Forbes v. Connolly* (1857) 5 Grant (U.C.) 657. In a Kentucky case it was held that the non-payment of the purchase price for twenty-one days after the end of the period limited was excusable, where the administrator of the owner of the land, after consulting counsel, had concluded that he could not receive the money, and some of the heirs were infants and others non-resident, *Page v. Hughes* (1842) 2 B. Mour. (Ky.) 429. Failure to tender the purchase-money will not work a forfeiture where the vendor is undeniably unable to perform his part by delivering a deed. *Barrett v. McAllister* (1890) 33 W.Va. 738.

of the grantee to exercise it, and, in view of such exercise, has consented to prolong the relations upon the continuance of which the right of exercising it depends, the grantee's non-compliance with a provision that so many days' notice shall be given of his intention will not be fatal to his rights (*h*).

45. Waiver of performance by grantor.—The conditions upon which the grantee of an option is to be entitled to its benefits may of course be waived altogether by the grantor. Such a waiver will be inferred from any statements of the grantor of the option which indicate that he regards the obligations of the grantee, as still existing—as where a lessor, after his lessee has failed to complete a purchase within the time limited, writes a letter to the lessee, threatening to take proceedings for the enforcement of the contract, if there should be any further delay (*a*). So also a covenantor who by his own conduct causes a failure to comply with the condition that the price should be paid before a certain date waives the condition to that extent (*b*). But in no case will a waiver be implied, where the grantor of the option was not aware of the breach of the condition which entitled him to forfeit the privilege (*c*).

XI. ENFORCEMENT OF OPTIONS BY THE COURTS.

46. Options, though merely unilateral contracts, specifically enforceable.—The fact that an option is a merely unilateral contract has naturally suggested, in suits for specific performance, the objection that they are wanting in mutuality; but it is now well settled that courts of equity will not refuse relief upon this ground.

Some authorities treat these cases as exceptions to the general rule that a contract is not specifically enforceable unless it is mutual,—that is such that it may be enforced by either party against the other (*d*). In other words, the broad ground is taken that the mere fact of a contract being unilateral is no impediment

(*h*) *Wilson v. Herbert* (1893) 76 Md. 489.

(*a*) *Pegg v. Wisden* (1850) 16 Beav. 239.

(*b*) *Mansfield v. Hodgdon* (1888) 147 Mass. 304. Compare sec. 43 ante.

(*c*) *Thompson v. Guyon* (1831) 5 Sim. 65 [landlord allowed tenant to remain in possession, not knowing that he was liable to ejectment for breach of covenants in the lease].

(*d*) Fry Spec. Perf., sec. 470; *Lawrenson v. Butler*, 1 Sch. & Lef. 13; *Chesterman v. Mann* (1851) 9 Hare 206 [covenant by lessor to renew].

to its specific enforcement in any case where it is supported by a consideration (*a*).

Another view is that options, though unilateral, are not wanting in mutuality, if they are supported by a consideration (*b*).

The correctness of this latter theory as regards options after acceptance is, of course, not open to controversy, for the contract is thenceforward bilateral and therefore binding on both parties (*c*); and it may be that the general language used in the cases just referred to is accounted for by the fact that the possibility of their being a distinction between options before and after acceptance was not present to the mind of the court. A due regard for precision of terminology seems to require a recognition of this distinction; but obviously it can have no practical effect upon the rights of litigants. Inasmuch as the due assent of the grantee of the option and his performance of the prescribed conditions are essential pre-requisites to the maintenance of his suit, it follows that, in every instance in which the elements of an option specifically enforceable are present, the dealings between the parties must have reached a stage at which the ingredient of mutuality is unquestionably present (*d*).

(*a*) *Watts v. Kellar* (C.C.A. 1893) 56 Fed. Rep. 1.

(*b*) *Waterman v. Waterman* (1886) 27 Fed. Rep. 827; *Johnston v. Trippe* (1887) 33 Fed. Rep. 330; *Herman v. Babcock* (1885) 103 Ind. 461; *Schroeder v. Gemender* (1875) 10 Nev. 355; *Ross v. Parks* (1890) 93 Ala. 153, 30 Am. St. Rep. 47, 11 S.R.A. 148; *Goodpastor v. Courtney* (1860) 11 Iowa 161; *Calanchuri v. Bramstelle* (1890) 84 Cal. 249. The fact that the agreement, which includes the option to purchase, contains other stipulations—as that the party receiving the option will build on the land and pay the taxes—will not prevent the enforcement of the option on the ground of want of mutuality. It will not be presumed that the privilege of purchase was not the very inducement of the acts which the person having the option was to perform. *Stansbury v. Fringer* (1840) 11 Gill & J. (Md.) 149 [demurrer overruled].

(*c*) *Frick's Appeal* (1882) 101 Pa. 485; *O'Brien v. Boland* (1896) 166 Mass. 481; *Carson v. Mulvany* (1865) 49 Pa. 88; *Smith's Appeal*, 69 Pa. 474; *Richards v. Green*, 8 C.E. Green (N.J.) 536; *Woodruff v. Woodruff* (1888) 44 N.J. Eq. 349 [mutuality held to be created by filing of bill for specific performance]; *House v. Jackson* (1893) 24 Or. 89; *Johnston v. Wadsworth* (1893) 24 Or. 494; *Gordon v. Darnell* (1880) 5 Colo. 300. An agreement giving a coke company an option to furnish a stated number of car-loads of coke at a specified price per ton if it can induce manufacturers to build more ovens to furnish the requisite amount, and, in case of its being successful, binding the other party to accept that quantity of coke ceases to be merely unilateral when the coke company is successful in inducing the coke manufacturers to build the necessary ovens. *Sheffield, &c., Co. v. Hull, &c., Co.* (1893) 101 Ala. 446.

(*d*) Compare the remark of Fry, L.J., in his work on Spec. Perf., that a "more satisfactory reason [for allowing these contracts to be enforced] is that, by instituting proceedings the plaintiff has waived the original want of mutuality, and rendered the remedy mutual." See also *Yerkes v. Richards* (1893) 153 Pa. 646, 34 Am. St. Rep. 721, where it was held that want of mutuality cannot be predicated from the fact that the person seeking to enforce the option executed under seal the contract which gave it, as agent and without disclosing that his principal was his wife, and that as he does not show authority to bind her, a feme covert, by deed, she is not bound. The court remarked that, even if an option be

47. Certainty of the terms.—Whether the option is granted in terms sufficiently certain to make it a subject for specific performance depends of course upon whether the contract is reasonably susceptible of a construction which will impart the required definiteness to the provision under discussion. In the subjoined note are collected several rulings, most of them relating to cases in which the uncertain ingredient was the price, the question in this case being whether the methods indicated for fixing it supply a standard sufficiently precise to form the foundation of a decree (a).

In any event specific performance will not be decreed until the price has been ascertained in the manner specified by the agreement (b).

"not mutual in the sense of equality of benefit, that is not the mutuality which stands in the way of enforcement; to bring it under this rule there must be want of mutuality in the remedy."

(a) A contract by which a yearly tenant has the right, if he wishes for a lease, to have it granted "for seven, fourteen, or twenty-one years at the same rent," is sufficiently certain to be specifically performed. It will be construed as creating a tenancy from year to year, "with an option given to the lessee to ask for a lease from the beginning, for twenty-one years, determinable, at his option, at the end of seven or fourteen years." *Hersey v. Giblett* (1854) 18 Beav. 174; Where a testator gives a right of pre-emption to a specified party at such price and upon such terms as the trustees of his will may think proper to fix, the Court will, upon the refusal of the trustees to act, have the price fixed before a Master, and then enforce the right. *Lord Radnor v. Shafts* (1805) 11 Ves. 448. Specific performance will not be refused, where a lessee is to have the privilege of purchasing upon such terms and "at the same price per acre as any other person or purchaser might have offered therefor." *Hayes v. O'Brien* (1894) 149 Ill. 403; nor where the price to be paid by a lessee is to be fixed by arbitrators or a "committee of three disinterested persons." *Herman v. Babcock* (1885) 103 Ind. 461. On the other hand, a Court declined to enforce a contract by which a person covenanted on the marriage of his daughter that her husband should have a certain estate for £1500 less than any other person would give for it. *Bromley v. Jeffries* (1700) 2 Vern. 415. So an option on land which fails to state the price and the terms, or the time for performance is too indefinite to be enforced. *Lombard Inv. Co. v. Carter*, 7 Wash. 4 [the Court here refused to supply the defects of the option by referring to a general policy of the grantor of the option (a railway company) in relation to its lands.] So specific performance has been refused of a covenant in a lease to the following effect: The party of the first part hereby agrees, in case the parties of the second part shall then be tenants of the premises, to first offer the said property so demised for sale by them for the sum of \$25,000. The Court refused to say that it meant either that there was an absolute agreement to offer the premises to the lessees at \$25,000, with the sole proviso that the lessees should then be tenants, or that it was to be read as if it ran: "In case the lessor first offers the property for sale for \$25,000, then he will first offer it to the lessees at that price." *Buckmaster v. Thompson* (1867) 36 N.Y. 558. So a covenant in a lease that, "if the premises are for sale, the lessee shall have the refusal of them," but not fixing the price nor providing any way in which it can be fixed will not be specifically enforced. The Court declined to rule that the contract should be taken to mean that the lessee was to have the refusal "on the same terms as anyone else." *Fogg v. Price* (1888) 145 Mass. 513.

(b) *Woodruff v. Woodruff* (1888) 44 N.J. Eq. 349.

If the nature of the transaction is such that it rests with the grantee of the option to reduce the contract to certainty by the terms in which his election is expressed, the language used must be definite and precise to warrant a court of equity in enforcing it (c).

48. Right of grantee of option to a good title.—A person with an option to purchase land has, like any other intending purchaser, a right to have a good title shewn to the property (a), unless this right has been waived by his own conduct or declarations; and the burden of proving such waiver lies on the grantor of the option (b). Similarly in the case of an agreement to lease, the vendor is bound to show that there is a subsisting valid agreement to lease. This he cannot do where he has given the owner of the premises a right to cancel the lease by failure to perform certain conditions, and, at the time when the purchaser repudiates the contract, there has been merely a conditional and contingent waiver of the right of the owner of the premises to avoid the term (c). Even where the contract giving the option provides that the money paid for it is to be forfeited if the purchase is not completed, the holder of the option may, if he discovers, before the end of the period which it covers, that the owner of the property has not a good title to it, rescind the contract and recover the money so paid (d).

49. Right to exercise option lost by estoppel.—A mortgagor who without the knowledge either of the heir of the mortgagor or of a purchaser from such heir, has reserved a right of pre-emption in case of a sale of the property, is precluded from claiming, as against such purchaser, the benefit of this right, where he allows the sale to be completed without mentioning that he had the

(c) *Christian &c. Co. v. Bienville &c. Co.* (1894) 106 Ala. 124, where the Court held that a contract for a water supply, with an option to the person supplied to have the service continued at a specified rate, was not void as to such option because of its indefiniteness as to such duration, but declined to enforce the agreement on the ground that the consumer had not expressed his election in sufficiently definite terms by a notice that he wished "to continue the service from month to month."

(a) *Welshman v. Spinks* (1861) 5 L.T. 385; *Brewer v. Broadwood* (1882) 22 Ch. D. 105; *Re Hunter* (1831) 1 Edw. Ch. (N.Y.) 1.

(b) *Welshman v. Spinks* (1861) 5 L.T. 385.

(c) *Brewer v. Broadwood* (1882) 22 Ch. D. 105.

(d) *Burks v. Davies* (1890) 20 Am. St. Rep. 213, 85 Cal. 110.

right (a). So also a party holding an option for the purchase of timber which is not limited as to time may estop himself from asserting it against a third person by acquiescence in the acts of the latter in removing the timber, and assisting the men engaged in the work (b).

50. Where the adequacy of the price is left to the discretion of the trustees, their action in accepting a certain amount will not ordinarily be interfered with, unless proof of fraud is given (c).

51. Equities adjusted under special circumstances between lessee and under-lessee, with option of renewal.—Where a tenant for lives under a lease not containing a covenant for perpetual renewal purchases the fee simple in order to save his estate, after the refusal of the holder of the reversion to renew the lease, such purchase does not give an under-lessee with a toties quoties covenant an absolute right to demand a perpetual renewal, by the insertion of new lives, but merely entitles him to call for a conveyance of the particular property comprised in his under-lease, upon the terms of satisfying his share of the expenses of acquiring it, having regard to the value of his covenants, which will have to be deducted from the valuation of the fee simple of the property comprised in his lease (d).

52. Enforcement of provisions giving continuing partners the option of purchasing share of retiring partner.—Since, generally speaking, a clause in partnership articles giving continuing partners a right of pre-emption as regards the share of a retiring partner is not the subject of conveyance in courts of law, it is not open to courts of equity to say, when the rights under such a clause are in question, that the parties will be left to their legal remedy. The jurisdiction of the latter courts to enforce the performance of such a clause is not merely discretionary as in the case of an ordinary contract between vendor and purchaser. In a proper case the violation of the right of pre-emption will be restrained by injunction, and its performance enforced, as a matter of course (e).

(a) *Orby v. Trigg* (1722) 9 Mod. 2.

(b) *Hanly v. Watterson* (1894) 39 W. Va. 214.

(c) *Edmunds v. Millett* (1855) 20 Beav. 52, refusing to restrain a sale.

(d) *Poslethwaite v. Lewthwaite* (1862) 2 Johns. & H. 237.

(e) *Humfray v. Fothergill* (1866) 1 Eq. 567.

But the discretionary powers of a chancellor will be freely used in shaping the relief granted, wherever the special circumstances render the ordinary remedies an inadequate protection to the interests of any of the parties concerned (*b*).

It will not be inferred that the partner desirous of selling may choose to which of his partners he will offer his share, and exclude some from the offer, unless, on the proper construction of the clause such a choice is clearly given. Hence if the pre-emption clause provides that the offer of the share of the outgoing partner shall be made first to all the other partners collectively, and, if that offer be declined, to the other partners desirous of collectively purchasing, an offer to all the continuing partners collectively, one of whom has determined, to the knowledge of the partner making the offer, not to purchase, enures to the benefit of the remaining partners, and they are entitled to specific performance (*c*).

In some cases special provisions are inserted in the articles with a view to ensuring that the retiring partner's offer of his share shall be duly brought to the knowledge of the other partners. Under such circumstances, it is sufficient if there is a substantial compliance with those provisions, particularly if the procedure followed is one which has been customarily followed in the same concern on previous occasions when a partner has retired (*d*).

Where notice has been given by one partner to another to exercise the option of the pre-emption reserved to each member of the firm under the articles, and the partner receiving the notice becomes a lunatic before he actually exercised the option, the notice is binding on the lunatic's committee, and the right of pre-emption is gone after the share is sold to a stranger (*e*).

(*b*) In a case before Lord Romilly, the articles provided that the partners who were to carry on business as surgeons for such a term as they should mutually agree, provided that in the event of the death or incapacity of either partner, the surviving or continuing partner might purchase his share in the business, and that, if he should decline, it might be sold to any other person who might be willing to purchase it. Upon the death of the partner who last entered the firm, the surviving member declined either to purchase or admit a stranger into the business. The course taken, as being most consistent with the true spirit of the articles, was to ascertain the value of the deceased partner in the concern at the time of his decease, and to charge the surviving partner with that amount. *Featherstonhaugh v. Turner* (1858) 25 Beav. 382.

(*c*) *Homfray v. Fothergill* (1866) L. R. 1 Eq. 567.

(*d*) *Glassington v. Thwaites* (1883) Coop. temp. Brough, 115 [provision as to notice to be given in writing, held to be satisfied by entry of offer in a book open to all the other persons concerned].

(*e*) *Rowland v. Evans* (1862) 8 Jur. N.S. 88, 30 Beav. 302.

XII. OPTIONS TO DO ONE OR OTHER OF TWO ALTERNATIVE THINGS.

53. Generally.—The principles determinative of the rights arising from options which expressly confer alternative privileges between which the grantee is allowed to choose are of course essentially the same as those already discussed. But, as the application of these principles is necessarily coloured in some degree by the presence of the distinctive element of this class of agreements, it will be convenient to note the decisions relating to them in a separate sub-title.

54. Construction of leases giving landlords the option to renew or pay for improvements.—(See also sec. 20, ante). The paying for the lessee's improvements, if the lessor takes them is the governing and main principle of these leases, and the renewal of the lease is but an optional and secondary consideration, which the lessor may or may not act upon (*a*).

Where the lessor covenants to renew, "if the same shall be lawfully demanded," or, "upon neglect or refusal so to do, after such demand," to pay for all improvements on the premises at a fair valuation, the option rests with the lessor and not the lessee either to renew or pay for the improvements (*b*).

Where the lessor has the option of continuing the lease or paying for the improvements, it is not the duty of the lessee to prepare and tender to the lessor the necessary instrument for continuing the lease; nor does the lessor sufficiently perform his covenant for renewal by being simply ready and willing to continue the lease. He must make his option and declare the same to the lessee before he can require the latter to prepare the new lease (*c*).

A covenant on a lease providing for the valuation of any buildings erected on the premises by the lessees, and upon such valuation that the lessor should have the option of paying the appraised value to the lessee, or to extend the lease for a further term of like duration, is deemed to have for its object merely the compensation of the tenant for improvements in one of two ways at the option of the landlord. The agreement will not be construed so as to prevent the tenant from waiving what is for his own benefit. It is only in case the tenant claims to be paid for improvements that the question of renewal arises, and the option of the landlord attaches. The mere fact that the tenant holds over at the expiration of the lease will not justify the inference that he intended to continue the occupation, upon the same conditions, nor warrant a court of equity in compelling him to

(a) *Bedell v. Rector, &c.*, (1855) 8 N.B.R. 21.

(b) *Hutchinson v. Boulton* (1852) 3 Grant (U.C.) 391.

(c) *Auley v. Peters* (1847) 5 N.B.R. 543.

accept a lease for another term. Any other construction would operate to make the lease perpetual at the will of the lessors (*d*).

The intention of the lessor to renew for the same term and the same rent is inferred where he allows the lessee to remain in possession for a year after the expiration of the term, without having the property valued according to a stipulation in the lease (*e*).

55. Options as to return and surrender of stock.—Where stock is to be paid for or returned at the option of the purchaser before a certain date, he is liable if he allows the option period to expire without returning the stock (*a*).

Where the purchaser of corporate stock is given the option to surrender it at the end of two years for the full amount paid by him, his election not to exercise that option is conclusively inferred where he surrenders the stock to the corporation for cancellation and receives other stock in lieu thereof, and he cannot enforce the original agreement (*b*).

(*d*) *Sears v. Mayor, &c.* (1889) 18 S.C.R. 702 (diss. Ritchie, C.J., and Taschereau, J.,) aff'g 28 New Br. R. 1.

(*e*) *Irvin v. Simonds* (1864) 11 New Br. R. 190.

(*a*) *Stevens v. Hertzler*, 109 Ala. 423.

(*b*) *Holsky v. Enslen* (1893) 103 Ala. 87.

C. B. LABATT.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act.)

PRACTICE—COUNTER-CLAIM SET UP BY REPLY—JUD. ACT 1873'(36 & 37 VICT., c. 66) s. 24, SUB-SS. 3, 7—ORDERS 199, 243, 250—(ONT. RULES 251, 252, 253, 274).

Renton v. Neville (1900) 2 Q. B. 181, was an appeal from Phillimore J. in Chambers, refusing to strike out a paragraph in the plaintiffs' reply setting up a counter-claim in reply to a counter-claim pleaded by the defendants. The defendants' counter-claim was for damages for breach by the plaintiffs of a contract, and the reply, besides denying that the alleged contract was binding on the plaintiffs, in the alternative alleged that if it was binding the defendants had committed breaches of it which caused loss to the plaintiffs which they claimed to set off against the defendants' counter-claim. The appeal was dismissed by the Court of Appeal (Collins and Romer, L.JJ.) who were of the

opinion that the case was governed by *Toke v. Andrews*, 8 Q.B.D. 428, and that as the plaintiffs relied on their counter-claim merely as a defence or shield to the defendants' counter-claim and not as a substantive cause of action, it might properly be set up by reply, and that it was not a case in which the matter relied on by the plaintiffs as a counter-claim could properly be set up by them by amendment of their statement of claim.

PAYMENT INTO COURT FOR LEAVE TO DEFEND—BANKRUPTCY OF DEFENDANT BEFORE TRIAL—SECURED CREDITOR—RULE 115—(ONT. RULE 603).

In re Ford (1900) 2 Q.B. 211, although a bankruptcy case, nevertheless deserves attention, inasmuch as it deals with the question of the effect of a payment into Court as a condition for leave to defend an action in which a summary motion for judgment is made under Rule 115, (Ont. Rule 603). In this case after the payment into Court had been made by the defendant and before the action had been tried, the defendant became bankrupt, and the trustee in bankruptcy applied to have the money so paid into Court, paid out to him; Wright, J., however held that he was not entitled to the money, which was to be regarded as paid in as a security for the plaintiff's debt in case he should succeed at the trial in establishing his claim, and that the plaintiff was to be regarded, to the extent of the money so paid in, as a secured creditor.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Practice.] DEUBER WATCH CASE CO. v. TAGGART. [Dec. 20, 1899.
Evidence—Leave to adduce, after judgment in appeal—Rule 498.

After the judgment of the Court of Appeal affirming the judgment of the trial judge dismissing the action, had been pronounced, drawn up, and entered, and while an appeal was pending therefrom to the Supreme Court of Canada, the plaintiffs moved for leave to adduce further evidence for the purpose of showing that an exhibit which was used as part of the evidence in the case was not a true copy of the original document. It was not suggested that there was any error in the judgment of the Court of Appeal which could be corrected by the introduction of the proposed evidence, or that, if the proposed evidence had been given while the appeal was pending, the judgment would have been different. It might tend to displace one of the grounds on which the trial judge relied, or might pre-

vent the defendants from relying upon that ground if the case went further, but that was all that could be said.

Held, that the application should be refused.

Rule 498, which empowers the Court to receive further evidence, is clearly confined to cases where such evidence is sought to be introduced for the purpose of the appeal.

C. Millar, for plaintiffs. *J. A. Mills*, for defendants.

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HIGH COURT OF JUSTICE.
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Divisional Court.] LARKIN *v.* LARKIN. [May 17.
Mechanics' Lien—Trial—Procedure—Mortgagee—Materials on land—Lien.

The procedure for the trial of an action under the Lien and Wage-earners' Act, R.S.O., c. 153, is the ordinary procedure of the High Court, which is not affected by sections 35 and 36 of the Act; and therefore a mortgagee against whom relief is sought must be made a party to the action within the time limited by sub-s. 1 of s. 24. Materials were placed on the land by the owner thereof and paid for by the mortgagee to be used in the construction of buildings being erected thereon, but not actually incorporated therein. The materials were taken by the owner to a planing mill to be planed for placing in the buildings, and having been left there for some time, and storage charges incurred, the owner sold them to the mill owner.

Per MEREDITH, C.J.—No lien attached on such materials, the incorporation thereof in the building being an essential element.

Per ROSE and MACMAHON, JJ.—Such lien would attach, notwithstanding the absence of such incorporation, but there having been a conversion, no relief could be granted, for there is nothing in the Act which enables the Court to assess damages which could be made applicable to lienholders.

John G. Farmer, for mortgagee. *Kirwin Martin*, for plaintiff.

Divisional Court.] ENGLISH *v.* LAMB. [May 26.
Slander—Privileged occasion—Malice—What constitutes—Misdirection—New trial.

In an action for slander, where the occasion was privileged, the learned Judge, in defining malice, which it was essential for the plaintiff to prove, told the jury that it consisted of a reckless statement, or a statement not true, made without consideration of what the probable consequences might be to another person; and of a statement not made in good-faith—not truly, but wantonly and recklessly, and without proper consideration.

Held, misdirection, for it should have been left to the jury to say whether the defendant acted through a wrong feeling in his mind against the plaintiff—some unjustifiable intention to do him wilful injury; and a new trial was directed.

George Ross, for plaintiff. *Wallace Nesbitt*, Q.C., for defendant.

Street, J.]

RE CURRY.

[June 14.

Evidence—Corroborative evidence—Interested party—R.S.O., c. 73, s. 10.

In an action by or against the representatives of a deceased person, the corroborative evidence required by R.S.O., c. 73, s. 10, may be found in the other facts adduced in the case, raising a natural and reasonable inference in support of the evidence whereof corroboration is required.

Semble, also, corroborative evidence within the meaning of that section may be given by an interested party so long as he is not the party obtaining the decision.

Fleming and J. H. Moss for A. A. Curry and executor of Cora Curry. *W. Nesbitt, Q.C.*, and *Ellis* for administrator of Emma Glen. *S. H. Blake, Q.C.*, and *Sutherland* for executor of J. R. Curry.

Boyd, C.] TOWN OF WHITBY v. GRAND TRUNK RAILWAY. [June 21.

Railways—Bond of provisional directors—Consideration of bonus—Conditions—Liability to perform after amalgamation with other company.

The P. W. & P. P. R. W. Co. by the bond of its provisional directors in consideration of a bonus in aid of the Company agreed "to erect and maintain during the operation of the railway in the said town (Whitby) workshops. The Company after certain changes of name amalgamated with other companies and formed a larger one called the M.R.W. Co., which latter company ceased to so maintain the workshops. The M.R.W. Co. subsequently amalgamated with and become part of the G.T. R.W. Co. (the defendants).

Held, 1. The bond of provisional directors of the P.W. and P.P.R.W. Co. was a corporate one binding on its successors and by consequence on the defendants who had acquired the road.

2. The road though it formed part of a larger railway connection represented by the defendants was still in operation, and as the contract was to maintain the workshops during the operation of the railway, it remained a binding engagement; and a reference to ascertain the damages, if any, for the breach of the covenant, was directed.

Aylesworth, Q.C., for plaintiffs. *Walter Cassels, Q.C.*, for defendants.

Meredith, C.J., Rose, J., MacMahon, J.]

[June 27.

EBY v. MCTAVISH.

Bill of sale and chattel mortgage—Hire receipt—Transfer of rights under—Conditional sale of chattels—R.S.O., c. 148—Ib. c. 149.

The purchaser of a piano under a hire receipt, by which on his completing certain payments on account, the property was to pass to him, but in the meanwhile to remain in the vendors, before he had paid the required sum, agreed with his wife that she should purchase his interest and pay the balance due the vendors. There was no bill of sale registered nor such change of possession as required by R.S.O., c. 148.

Held, that the transaction was invalid as against execution creditors, under s. 37 of that Act; and that the transaction was not within s. 41, subs. 4, which was intended to except only conditional sales of chattels, within R.S.O., c. 149. The last named Act was not applicable here where there had been, as between husband and wife, no delivery of possession without the ownership of the property being acquired, within s. 1 nor any writing evidencing the transaction.

Held, however, that the wife was entitled to be subrogated to the rights of the vendors of the piano to the extent of the payments made by her.

Maybee, Q.C., for plaintiff. *Idington*, Q.C., for defendant.

Street, J.] CARSCALLEN *v.* WALLBRIDGE. [July 10.
Election by wife between benefits under separation deed and will of husband.

A husband in a separation deed covenanted to pay his wife an annuity of \$200.00 as follows: \$100.00 on 1st June and December in every year and charged it on certain land; the wife accepting it in full satisfaction for support, maintenance and alimony during coverture and of all dower in his lands then or thereafter possessed.

The husband by his will, subsequently executed, directed his executors to pay his wife \$400.00 annually, \$200.00 on 1st June and December in each year during her life and added "which provision in favour of my said wife is made in lieu of dower."

Held, that the wife was not put to her election between the benefits under the deed and the will, but was entitled to both.

M. Wright, for plaintiff. *Northrup*, Q.C., for defendants.

Province of Nova Scotia.

COUNTY COURT.

Joh::ston, Co. J., in Chambers.] [July 12.
McMANUS *v.* TRACY.

Collection Act, 1894—Order to assign—Tool of trade.

This was an appeal from the order of a Commissioner which directed the defendant to assign in addition to all his other real and personal property one Gemunder violin. Defendant contended that s. 10 of "The Collection Act, 1894," having provided for the assignment of all the debtor's real and personal property in trust for the payment of the amount due, without further providing for the specifying of the particular things assigned, the Commissioner had exceeded his rights in ordering the defendant to assign said violin, and the order was therefore bad, and he further contended that said violin was a tool of trade (he having at the time of making of said order no other way of earning his living, but by playing

on said violin for money), and being as such exempt from execution under s. 1, sub-s. (e) of c. 34 of Acts of 1885, the same was not assignable under the Collection Act.

JOHNSTON, Co. J.—The only question here is as to whether the order for the defendant to assign is correct. The Act says the debtor may be ordered to assign all his real and personal property, and exception is taken to the order in addition specifying a violin while real and personal property would be sufficient and would embrace a violin. I do not think the specifying a violin vitiates the order.

I do not think the violin is exempt from execution; it is not a tool of his trade or calling, but an instrument upon which he practised gratuitously and for his own pleasure, though occasionally he may have received pay for his services. I dismiss the appeal with costs.

Province of New Brunswick.

SUPREME COURT.

En Banc.]

EX PARTE KEERSON.

[June 15.

Disclosure examination—Order in nature of mandamus.

An order in the nature of a mandamus under section 15 of the County Court Act will not lie to compel a County Court judge to discharge a defendant on examination under 59 Vict., c. 28, s. 32. Rule discharged: *G. Belyea*, in support of rule. *Allen*, Q.C., and *Barnhill*, contra.

Province of Manitoba.

QUEEN'S BENCH.

Richards, J.]

MILLER v. WESTBOURNE.

[August 30.

Practice—Particulars in action of tort—What must be shown to get order for particulars.

The statement of claim alleged negligence by defendants in the construction of a ditch along the highway in front of plaintiff's land and neglect to keep such ditch in repair, and that in consequence a larger quantity of water was brought on to plaintiff's land and crops than would otherwise have naturally flowed thereon. Defendants applied for an order for particulars of such negligence and of the damages resulting therefrom, upon an affidavit of their solicitor proving service of a demand for such particulars and refusal to furnish same, and stating that defendants could not prove their statement of defence without them.

Held, that this affidavit did not show sufficient grounds to entitle defendants to the order asked for, that special grounds must be shown, and that at least such facts must be shown as would satisfy a judge that

defendants would be embarrassed in their defence without such particulars and that justice requires their delivery.

Brown v. G. W. Ry. Co., 26 L.T.N.S., 398 followed, although perhaps it goes further than would now be required in every case.

Metcalf, for plaintiff. *Hough*, Q.C., for defendants.

Province of British Columbia.

SUPREME COURT.

Martin, J.]

IN RE SOY KING, AN INFANT.

[July 26.

Infant—Right of person standing in loco parentis to custody of, as against stranger—How lost—Habeas corpus—Practice.

A girl aged fourteen was taken by a Refuge Home from the custody of a person standing in loco parentis who was proved to be leading a bigamous life.

Held, on habeas corpus proceedings, that such person had lost his right to the custody of the infant.

An application in vacation for a rule nisi for a writ of habeas corpus should be made in Chambers.

Fell, shewed cause. *Helmcken*, Q.C., contra.

Full Court.]

GRUTCHFIELD v. HARBOTTLE.

Mining law—Failure to record transfer of mineral claim—Right of locator subsequent to such transfer—Mineral Act, ss. 9, 49 and 50.

The decision of MARTIN, J., reported ante p. 358, was appealed by the defendant to the full court and was reversed, the following judgment of the court being delivered by McCOLL, C.J.—There is apparently a conflict between ss. 49 and 50 of the Act. The former provides that an assignment though not recorded within the time limited shall be valid as between the parties and the latter that it shall be "enforceable" between them only after having been recorded. In my opinion the failure to record did not result in the claim becoming waste lands of the Crown open to location. An assignment is ordinarily enforceable against an unwilling party only by some legal process, and I think that s. 50 can and ought to be construed as meaning merely that a court should not afford relief before record of the assignment, thus giving effect to both sections.

WALKER and IRVING JJ. concurred. Appeal allowed with costs.

S. S. Taylor, Q.C., for appellant. L. P. Duff, for respondent.

North-West Territories.

SUPREME COURT.

Rouleau, J.]

QUEEN v. SETON.

[Aug. 7.

Master and servant—Information must state offence with accuracy and precision—Information must not charge two offences—Magistrate must allow defendant reasonable time to appear to answer complaint.

The information was under Consolidated Ordinances, c. 50, s. 2, and charged : (1). That Elinor Mary Seton, formerly of the Village of Pincher Creek, but now temporarily of the City of Calgary, in said Territories, cook, was on the 21st day of December, A.D., 1899, a person engaged as a servant to the firm of Mitchell & Dobbie, and while so engaged and on same date refused to perform her duties, contrary to the provision of c. 50 of the Consolidated Ordinances of the North-West Territories.

(2). That the said Elinor Mary Seton on the said 21st day of December, being a servant of the firm of Mitchell & Dobbie did on the said date absent herself without leave from the proper service and employment, contrary to the provisions of c. 50 of the Consolidated Ordinances of the North-West Territories.

The Magistrate convicted the defendant that she on Dec. 21, 1899, while being a servant of Mitchell & Dobbie and employed by them as cook at the village of Pincher Creek in the North-West Territories, absented herself without leave from her proper service and employment contrary to the above provisions.

James Muir, Q.C., for defendant. *C. A. Stuart* and *C. F. Harris*, for the magistrate and the informant.

ROULEAU, J.—*Held*, 1 that the mere fact that a servant absents herself without leave is not per se an offence known to the law. The naked words of the Ordinance in the information would not therefore give authority to the magistrate to commit the servant unless it should appear on the face of the information that the servant absented herself without leave and without lawful excuse.

2. That not only the information is bad because it does not charge any offence and thereby does not give jurisdiction to the Magistrate, but the conviction is bad also because it does not state any offence : *Youle v. Mappin*, 30 L.J.M.C., 234 ; *Rider v. Wood*, 29 L.J.M.C. 1. ; *Turner v. Ollerton*, 15 L.J.M.C. 140.

3. That where the information charges two offences and the conviction is for one offence only, such conviction is bad in law. See, however, *Regina v. Hazen*, 20 Ont. App. 633.

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A writer in the August number of the *Law Magazine and Review* takes the English Incorporated Law Society to task for various faults and failures, suggesting, however, that when the members at large are fairly represented on the Council, and the present system, which practically amounts to the election of the nominees of a clique, is done away with, certain reforms will be easy and possible. He then proceeds with his list of grievances. One of these is akin to a matter which affects ourselves :—"The ridiculous incompetence of the Council of the Incorporated Law Society allows the profession to be tied up to a scheme of charges in conveyancing matters which amounts to only a fraction of the charges which house agents are able to recover as customary in the courts of law." Our difficulty is not quite the same as that of our brethren in England, but it is equally irritating and unfair to solicitors, and especially so in country places. The profession in Ontario are still looking to the Benchers to do something for their protection against unlicensed conveyancers. The writer concludes his article by saying "we ought to make a clean sweep of the present Council, and then reforms would be speedily put forward and duly carried."

"You shall refuse no man's cause." The *English Law Times* very properly denounces a resolution passed recently at a meeting in Carnarvon, calling on temperance men not to support "any candidate who acts professionally as counsel for the liquor trade at licensing sessions." Our contemporary justly characterises this as an attempt to identify the advocate with his client, and an assault on the true interests of society at large. Even in this country it may perhaps be necessary to call to mind that in the oath which every barrister is required to take, is included a promise "to refuse no man's cause," so that a barrister who conscientiously regards his oath, is not at liberty to pick and choose his clients, and even a man with an unpopular, or a bad case, is entitled to the benefit of the services of any advocate he may choose to employ and pay,

whose services have not already been secured on the other side. This being the position in which the law places an advocate for the benefit of the community, it is absurd and unjust for anyone to seek to identify counsel with their clients, or in any way make them responsible for the demerits of the case.

The question of the proper dress for men in public has been exercising one of the United States Courts. A traveller having bought a ticket on the defendant's steamer, desired to ride in the saloon in his shirt sleeves. The officers of the boat disagreed with the gentleman as to the propriety of his apparel, ladies being present. A suit resulted. The jury agreed with the officers of the boat and the plaintiff failed in his claim for damages. We quite agree with the jury, but note that in this instance, at all events, the boast of America being a "free country" is not borne out. The question of dress is really one for the ladies to pass upon, and having taken the opinion of some experts of that sex, we gather the unwritten law to be that a shirt without suspenders or a waistcoat is en regle, but that the presence of either of these articles without a coat to cover them puts the wearer out of Court; and we are told that Garibaldi's uniform was a plain red shirt. The writer remembers once appearing (as a student) before the then Clerk of the Common Pleas at Osgoode Hall in Vacation to tax a bill of costs, minus his coat, the weather being intensely hot. This was a terrible shock to the officer, who declined to "see" him or to proceed with business until the outside garment was resumed. That dignified official may perhaps be as much shocked now by a wigless Judge in England (see ante p. 476) as he once was by a coatless clerk; but what will he think, of a coatless Court? We read that on a torrid day last month in Ohio a Judge of that state remarked to the jury, that while he desired to maintain the dignity and decorum of the Court, yet he thought that in such weather some latitude should be permitted, and that any of the jurymen who pleased were at liberty to take of their coats. Shortly after one of the counsel asked if the privilege given to the jury might be extended to counsel. The Judge assenting, the counsel followed suit. After some hesitation the Judge himself did the same. One by one as the day advanced all the jurors took advantage of the permission, and before the Court adjourned were in their shirt-sleeves. This will doubtless be to our old friend at Osgoode Hall a sad proof of the degeneracy of this end of the nineteenth century.

TAX SALES.

A perusal of the authorities cannot fail to lead one to the conclusion that very few sales for taxes, if attacked in time, will stand the test. That this is largely due to the negligence of the officials entrusted with the collection of taxes is another almost inevitable conclusion. These officials, namely, the treasurers, clerks and collectors of municipalities do not appear to be sufficiently versed in their duties, and in the requirements of the statutes, having in view the imperative necessity of strictly conforming thereto.

It must, however, be admitted that the Courts are very technical in the construction placed on the Acts dealing with the subject, but for this reason, if for no other, the officials should exercise a far greater degree of care. It may be that in a great many cases properties are sold for such a small sum in arrears, and at such a ridiculously low figure, that the Courts are glad to find some flaw in the proceedings to relieve a poor unfortunate, who wakes up to find his property gone like a passing shadow, and now in the hands of some land grabber, who is always to be found lurking about the civic bargain counter. Chief Justice Wilson, in *Deverill v. Coe*, 11 O. R. at p. 236, says :—"It is full time to stop these sales which are used for the benefit of speculators only, and who are furnished by the Government with the power of depriving the innocent but careless land-owner of his property, or of enforcing from him the almost extortionate demand for getting back what is in justice his own." Also Armour, J., in the same case at p. 241 :—"I do not appreciate very highly the hardship to the speculator in the purchase of lands for taxes, whose chief hope of gain lies in the owner of the land being kept in ignorance that his land has been sold for taxes, and who traffics upon the chances of his ignorance continuing until he may be able, as he hopes, to deprive him of his land." The statutes dealing with the subject have come in for much judicial discussion in recent years, but before referring to the cases, it will be well to briefly summarize the duties of the afore-mentioned officials in regard to sales for arrears of taxes, apart from their other duties, under the Assessment Act, R.S.O. 1897, c. 224.

I. It is the duty of the Treasurer :

1. To furnish to the clerk of his municipality a list of all the lands in his municipality, in respect of which any taxes have been

in arrear for the three years next preceding the 1st day of January in any year; the list to be furnished on or before the 1st of February in each year, and headed "List of lands liable to be sold for taxes in the year 18—."

2. In cases of towns and villages, within 14 days after the time appointed for the return and final settlement of the collector's roll, and before the 8th day of April in every year, to furnish the county treasurer with a statement of all unpaid taxes and school rates, directed in the said collector's roll, or by the school trustees, to be collected. Sub-s. 2 of s. 157 provides what such returns shall contain.

3. To prepare a list of the lands to be sold, and advertise them, as provided by ss. 177, 178, 179, 180 and 181. See ss. 152, 157, 177, 178, 179, 180 and 181 of the Act, and 61 Vict. c. 25, s. 3.

II. Of the Clerk :

1. To deliver the roll certified under his hand to the collector, on or before the 1st of October, or such other day as may be prescribed by by-law of the local municipality.

2. To keep the list furnished by the treasurer on file in his office for public inspection.

3. To deliver the copy of the list to the assessors in each year as soon as they are appointed.

4. To file the list returned by the assessor in his office for public use.

5. To furnish forthwith to the treasurer a copy of the same, certified by him under the seal of the corporation.

6. To examine the assessment roll and certify the lands which have become occupied, and make a return to the treasurer as provided by s. 155 of the Act. See ss. 131, 153 and 155.

III. Of the Assessor :

1. To ascertain if any of the lands, or parcels of land, contained in the list were occupied, or were incorrectly described.

2. To notify such occupants and owners, if known, whether resident within the municipality or not, upon their respective assessment notices, that the land is liable to be sold for arrears of taxes.

3. To enter on the list "occupied and parties notified," or "unoccupied," or "incorrectly described," as the case may be.

4. To sign such list and return it with the assessment roll to the clerk, together with a memorandum of any error discovered

therein, and to attach to each such list a certificate, verified by oath, in the form provided by s. 154.

5. If there is not sufficient distress upon the occupied lands to so return it in his roll to the treasurer, showing the amount collected, if any, and the amount remaining unpaid, and stating the reason why payment has not been made. See ss. 153, 154 and 156. See also s. 147, as amended by 61 Vict. c. 25, s. 2.

The law appears to be well settled that the substantial compliance with the provisions of the above sections relating to the duties of these officials is a condition precedent to the right to sell or to distrain for arrears of taxes. In *Deverill v. Coe*, 11 O.R. where no notice of arrears was given to the then owner or occupant, and they were not entered on the roll as required by the Act, and no notice given as required by s. 109 of R.S.O. 1877 (s. 153 of R.S.O. 1897), that the land was liable to be sold for taxes, it was held that the sale could not be supported, and that the irregularity could not be cured by ss. 155 and 156 of the former Act (ss. 208 and 209 of the latter Act). In this case Wilson, C.J. makes some observations on the impropriety of tax sales as now conducted under the legislative authority, and he suggests a remedy in the following words at p. 236:—"But what would be infinitely better would be to put an end to the sale of lands for taxes. These sales were adopted here at a time when the country was thinly settled, and large tracts of land were held by absentees and other non-residents, and the taxes could not at that time be collected which were chargeable against them, and the lands were comparatively of little value. The country is in a different condition now, and it is full time to stop these sales. . . . Means may be devised by the legislature to have these arrears placed yearly upon the collector's roll for collection until they are paid, and if they are not paid in some few years—say five—let the municipality become the owners of such lands upon some terms and conditions which may give the owner a chance of redemption for a longer period, and if not redeemed, with power to the council to sell such lands by public sale, and to apply the proceeds for the benefit of the municipality. If any one is to profit by these sales let it be the municipality, or in other words, the public, and not the private and unmeritorious speculator."

As to the imperative provisions of the Act, see also *Donovan v. Hogan*, 15 A.R. 432; *Town of Trenton v. Dyer*, 21 A.R. 379, 24

S.C.R. 474; *Love v. Webster*, 26 O.R. 453; *Caston v. City of Toronto*, 26 O.R. 459, 30 S.C.R. 390, and *Johnson v. Kirk*, 30 S.C.R. 434.

It has been held by the Court of Appeal, affirming *Hutchinson v. Collier*, 27 C.P. 249, and *The Church v. Fenton*, 28 C.P. 204, that the two years limited by s. 209 of R.S.O. 1897, run from the time of making the tax deed, not from that of the auction sale: *Donovan v. Hogan*, supra. In *Deverill v. Co.*, the judges question whether the effect of ss. 155, 156 of R.S.O. 1877 (ss. 208, 209 of R.S.O. 1897), is to make valid all sales for taxes so long as there are any taxes in arrears, notwithstanding every kind of neglect and misconduct of the municipal officers, they practically come to the contrary conclusion, Armour, J., being particularly emphatic; p. 241:—"The taxes must be legally due, and the arrears must be taxes legally in arrear, so that the land may be legally sold, otherwise ss. 155 and 156 of the Assessment Act do not apply." Again, "the owner should be considered, and the sales conducted as ordinary business transactions, as where property is sold by auction with a view to obtain its fair market value, and where the lands have been sold for a grossly inadequate price, as is generally the case, and the same is not redeemed in one year after the sale, as provided by s. 208, the sale might still be questioned as not having been openly and fairly conducted within the meaning of that section: *Deverill v. Coe* and *Donovan v. Hogan*." See also *Hall v. Farquharson*, 15 A.R. 457.

So that the apparent effect of these two sections, 208 and 209 as construed in the light of the above authorities, is:

(a) To make all sales unimpeachable after one year from the time of the auction sale where the taxes are legally due and in arrears, and where all requisite formalities have been observed, and the sale openly and fairly conducted;

(b) To make all sales unimpeachable after two years from the date of the making of the tax deed where the taxes are legally due and in arrears, notwithstanding the fact that the formalities required by the statute have not been observed, or that the sale has not been openly and fairly conducted; but some expression of doubt is thrown even on this conclusion by Wilson, C.J.;

(c) To make the sale impeachable after one year from the auction sale, and within two years from the giving of the tax deed,

where the sale has not been openly and fairly conducted, notwithstanding the fact that the taxes are legally due and in arrears, and that all requisite formalities have been observed ;

(d) That they do not apply at all under certain circumstances referred to by the Judges in the above cases, where, for instance, there are no taxes legally due and in arrears.

It is interesting to note that McDougall, C.J. of York, has held that a county municipality is not liable for the cost of advertising the county treasurer's list of sales for arrears of taxes, although sent to the plaintiff by the county treasurer, and that the county treasurer does not act as an officer of the corporation in relation of tax sales, and that the duties connected therewith are not within the scope of his authority as county treasurer. He is merely *persona designata* on behalf of the local municipality, and the creditor must look to him personally: *Warwick v. County of Simcoe*, 36 C.L.J., 461.

Hamilton.

JOHN G. FARMER.

Lord Alverstone, formerly Sir Richard Webster, has been appointed Lord Chief Justice of England, in succession to the late Baron Russell of Killowen. Mr. Justice A. L. Smith succeeds Lord Alverstone as Master of the Rolls.

The following judicial appointments were published in the *Canada Gazette* of October 13th: George F. Gregory, Q.C., of the City of St. John, to be a puisne judge of the Supreme Court of the Province of New Brunswick; and Joseph Emery Robidoux, Q.C., of the City of Montreal, to be a puisne judge of the Superior Court of the Province of Quebec.

The *Central Law Journal* notes a case of the *City of Kansas v. Orr*, 61 Pac. Rep. 397, where it is held that the fact that one who sustains injury by reason of the negligence or wrongful act of another may have been at the time of the injury acting in disobedience of his collateral obligations to the State, which required of him the observance of the Sunday law, will not prevent a recovery from one whose wrongful or negligent act or omission was the proximate cause of the injury.

 ENGLISH CASES.

 EDITORIAL REVIEW OF CURRENT ENGLISH
DECISIONS.

(Registered in accordance with the Copyright Act.)

CONTRACT—WAGERING CONTRACT—MARINE INSURANCE ACT 1745 (19 GEO. 2, c. 37), s. 1—REFUSAL OF COURT TO ENFORCE ILLEGAL CONTRACT THOUGH DEFENCE OF ILLEGALITY NOT SET UP.

In *Gedge v. Royal Exchange Ass. Corp.* (1900) 2 Q.B. 214 the plaintiffs sought to recover on a policy of marine insurance, the plaintiffs' evidence disclosed that the policy sued on was a wagering contract, and, as such, null and void under the Marine Insurance Act, 1745, (19 Geo. 2, c. 37), s. 1. No defence of illegality was set up by the defendants, but Kennedy, J., who tried the action, held that the Court could not give effect to the contract which plainly was invalid under the statute and he dismissed the action, but without costs.

ARBITRATION—EXTENDING TIME FOR MAKING AWARD—JURISDICTION—ARBITRATION ACT, 1889, (52 & 53 VICT., c. 49), ss. 9, 24.—(R.S.O. c. 62, s. 10).

Knowles v. Bolton (1900) 2 Q.B. 253, was an appeal from Kennedy, J., refusing to extend the time for making an award. The arbitration in question was had under a statute which provided that the time for making the award, by arbitrators or an umpire, under the Act, should not in any case be extended beyond the period of two months from the date of the submission to arbitration or the date of the reference of the matters to the umpire, respectively. Kennedy, J., relying on the case of *In re Mackenzie & Ascol Gas Co.* 17 Q.B.D. 114, was of opinion that there was no jurisdiction to extend the time; the Court of Appeal (Smith and Romer, L. JJ.) reversed his decision and held that although the Act under which the arbitration took place precluded the arbitrators or umpire from extending the time for making their award beyond the time limited, it nevertheless did not exclude the jurisdiction of the High Court to grant an extension under the Arbitration Act 1889, (52 & 53 Vict., c. 49), ss. 9, 24, (R.S.O. c. 62 s. 10), and the Court of Appeal granted an extension of time notwithstanding that the two months' limit had expired.

PRINCIPAL AND AGENT—STOCK BROKER, DEFAULT OF—LIABILITY OF PRINCIPAL TO JOBBER—PRIVITY OF CONTRACT.

Anderson v. Beard (1900) 2 Q.B. 260 is a case somewhat similar to *Beckhuson v. Hamblet*, noted ante p. 441, the action being brought by a stock jobber against the client of a broker who had made default in completing a purchase of shares from the plaintiff. The plaintiff having discovered that the contract had been entered into by the broker on behalf of the defendant called on him to take up the shares, and on his refusal to do so he resold the shares and claimed to recover from the defendant the difference between the price agreed to be paid by the broker and the price realized on the resale. The case, however, differed from *Beckhuson v. Hamblet* inasmuch as the transaction was a single one and no others besides the defendant were interested in the purchase. Mathew, J., therefore held that the plaintiff's action was well founded, and he gave judgment in his favour for the amount claimed.

LANDLORD AND TENANT—FORFEITURE—COVENANT NOT TO ASSIGN—EQUITABLE ASSIGNMENT—DECLARATION OF TRUST—NOTICE BEFORE ACTION—SERVICE OF NOTICE ON "LESSEE" CONVEYANCING AND LAW OF PROPERTY ACT, 1881, (44 & 45 VICT., C. 41) s. 14, SUB-SS. 1, 6, (i); s. 67, SUB-S. 2—(R.S.O. C. 170, s. 13, SUB-SS. 1, 6 (a))—JUD. ACT, 1873, s. 24, SUB-S. 4—(ONT. JUD. ACT, s. 57, SUB-S. 8).

Gentle v. Faulkner (1900) 2 Q.B. 267 was an action of ejectment brought by a landlord against his lessee. The lease under which the defendant held provided that the lessee should not assign or sub-let the demised premises, and it also provided for re-entry in the event of the lessee making any assignment for the benefit of creditors. The lessee had made an assignment of his property, except the demised premises, for the benefit of his creditors, and declared that he would stand possessed of the leasehold upon trust for the trustee and to assign and dispose of the same as the trustee should direct. Notice had been given of the claim of the plaintiff to reenter to the assignee for creditors who had taken possession, but no notice had been served on the lessee, the defendant. Byrne, J., who tried the action, held that the deed of assignment followed by the possession by the assignee was by virtue of the Jud. Act, s. 24, sub-s. 4, (Ont. Jud. Act, s. 57, sub-s. 8) an assignment of the demised premises, and a breach of the covenant not to assign, and that the plaintiff was entitled under the Conveyancing Act, 1881, s. 14, sub-s. 1, (R.S.O. c. 170, s. 13, sub-s. 6 (a)).—

to enforce his right of reentry without giving any notice. On appeal, however, the Court of Appeal (Smith, Williams, and Romer, L.JJ.), came to a different conclusion. In the opinion of that Court a covenant not to assign or sublet, is only broken by the execution of a legal assignment or sub-lease, and a mere equitable assignment is not a breach; furthermore, in order to entitle the plaintiff to recover on the ground that the execution of an assignment for the benefit of creditors worked a forfeiture, it was necessary for him to give notice to the "lessee," under the Conveyancing Act, 1881, (R.S.O. c. 170, s. 13, sub-s. 1), and notice to the assignee for creditors was not a notice to the "lessee" and was insufficient. The contention of the plaintiff that notice to the lessee was unnecessary was met by Romer, L.J., by the observation that notwithstanding the assignment, the lessee continued to have an interest in the premises, not only onerously but beneficially, in the first place in the resulting trust, and in the second place, as trustee of the leasehold he would be entitled to retain the lease as an indemnity against any breach of covenant, and besides was the only defendant in the action.

INSURANCE (MARINE)—POLICY ON SHIP—"FURNITURE" ON SHIP, MEANING OF.

* In *Hogarth v. Walker* (1900) 2 Q.B. 283, the Court of Appeal (Smith, Williams, and Romer, L.JJ.) have affirmed the judgment of Bigham, J., (1899) 2 Q.B. 401, (noted ante vol. 35, p. 681) to the effect that certain mats and cloths used upon a ship for the proper carriage of a certain kind of cargo, were properly within the term of "furniture" of the ship in a policy of insurance, although at the time of the loss of the ship, it was not engaged in the carriage of a cargo requiring the use of such cloths and mats and which were not in fact then in use, but stowed away in the fore peak.

CONTRACT—IMPOSSIBILITY OF PERFORMANCE—IMPLIED CONDITION—MEASURE OF DAMAGES.

Nickoll v. Ashton (1900) 2 Q.B. 298, was an action brought to recover damages for breach of a contract. By the contract in question, made in October 1899, the defendants sold to the plaintiffs a cargo of cotton seed to be shipped at certain Egyptian ports during the month of January, 1900, per steamship Orlando, and to be delivered to the plaintiffs in the United Kingdom. The contract provided that "in case of prohibition of export, blockade,

or hostilities preventing shipment, this contract, or any unfulfilled part thereof, is to be cancelled." In December, 1899, the *Orlando*, without any default of the defendants, stranded, and it was so much damaged as to be incapable of reaching the ports of loading before the end of January. On the 20th December notice of that fact was given to the plaintiffs. Upon receipt of this notice the plaintiffs might have bought another cargo of cotton seed in substitution for that sold by the defendants, but declined doing so. The market was rising, and by the end of January the market price had risen considerably above the point at which it stood on the 20th December. The plaintiffs claimed as damages the difference between the contract price and the market price at the end of January. The case was tried by Mathew, J., who dismissed the action on the ground that there was an implied condition in the contract, that in the event of the ship not arriving at the ports of loading within the stipulated time in a fit condition to receive the cargo, the contract should be treated as at an end, and that the implication of this condition was not excluded by the clause expressly providing for the cancellation of the contract in the specified events. He also expressed the opinion that even if the plaintiffs had been entitled to recover, they were, under the circumstances, bound to endeavour to mitigate the loss, and that the measure of damages would have been the difference between the contract price and the market price at the date when the plaintiffs had notice of the stranding.

COMPANY—WINDING UP ORDER—CREDITOR'S PETITION—DISCRETION.

In re Greenwood (1900) 2 Q.B. 306. A proceeding had been instituted by a joint stock company in the interest of its debenture holders which had been dismissed with costs. The costs not having been paid, the person to whom they were payable presented a petition to wind up the company in order to compel the company to enforce its right to indemnity against the debenture holders. It appeared that the assets of the company were insufficient to pay the claims of the debenture holders, but inasmuch as the enforcement of the right of indemnity would be of no benefit to the general body of the creditors of the company, Bigham, J., held that the winding up order, in the exercise of a proper discretion, ought not to be granted.

DISCOVERY—OFFICER OF CORPORATION—RULES 343, 347, 366,—(CF. ONT. RULES 439, 461),—EVIDENCE.

In *Welsbach Incandescent Light Co. v. New Sunlight Co.* (1900) 2 Ch. 1, the Court of Appeal (Webster, M.R., and Rigby and Collins, L.JJ.,) discusses the questions as to the extent to which an officer of a corporation may be examined for the purposes of discovery, and how far such examination is evidence against the corporation. With regard to the first point the rule is laid down that a servant of a corporation examined for discovery is only bound to answer as to his knowledge acquired in the course of his employment by the company, and as to the result of inquiries made by him of other officers and agents of the company with regard to their knowledge acquired in the same way, but that he is not bound to answer as to his own knowledge, or to make inquiries of the other officers or agents of the company as to their knowledge acquired accidentally or in some other capacity. Such examination may be read against the company, but it would seem that it is not conclusive, and that it is only *prima facie* evidence, and that the company would be at liberty to shew that the answers of their officers were mistaken or otherwise wrong. In Ontario an express Rule 461 defines the limits within which such an examination may be used as evidence against the corporation.

PRIVATE INTERNATIONAL LAW—LUNACY—FOREIGN LUNATIC—ACTION BY LUNATIC AND FOREIGN ADMINISTRATEUR PROVISOIRE—LUNATIC NOT SO FOUND—ORDER OF FOREIGN COURT.

Didisheim v. London & Westminster Bank (1900) 2 Ch. 15, was an action brought by a foreign lunatic by her next friend and a foreign administrateur provisoire of her estate. The lunatic was administrator of her husband's estate, part of which was in the possession of the defendants. She was also, in her own right, entitled to moneys and securities in the defendants' hands. Her husband was a foreigner domiciled in Belgium at the time of his death. After his widow had obtained letters of administration, with the will annexed, to his estate in England, she became a lunatic, and was confined in a lunatic asylum in Belgium, but she had not been placed under "interdiction" nor under guardianship, but, at the request of a family council, one, Didisheim, had been appointed administrateur provisoire of her estate, without security. He obtained letters of administration de bonis non to her hus-

band's estate, and claimed from the defendants the delivery of the moneys and securities in their hands belonging to the estate of the husband, and to the lunatic in her own right. The lunatic was joined as a plaintiff by Didisheim as her next friend. An order authorizing the bringing of the suit had been made by the Belgian Court, but no such order had been made by the English Court of Lunacy. The defendants contended that an action by the lunatic by a next friend for the delivery up of property would not lie because neither the lunatic nor next friend could give a valid receipt. As regards the property of the husband they claimed that although Didisheim might, as administrator de bonis non, be entitled to recover property outstanding belonging to his estate, yet he could not recover property which had been got in and appropriated by the lunatic administratrix ; and as to the lunatic's own estate they contended that the only Court which could give Didisheim as administrateur provisoire, the right to recover English property was the English Court of Lunacy. North, J., dismissed the action, but the Court of Appeal (Lindley, M.R., Rigby and Williams, L.JJ.) reversed his decision. That Court was of opinion that an action by a lunatic not so found, by his next friend, was maintainable to recover the property of the lunatic, and that there was no ground for the contention that the previous sanction of the Court of Lunacy to the bringing of such a suit was necessary, and that on principles of private international law the English Court was bound to give effect to the order of the Belgian Court. So far as the lunatic's own property was concerned the action was held to be properly brought, and the plaintiff entitled to recover : as regards the claim of Didisheim to recover as administrator de bonis, the Court of Appeal held that although formerly such a claim could not have been joined with the claim of the lunatic to recover her own property, yet under the Judicature Act the two claims might be joined, the defendants having made no objection thereto, and that Didisheim was entitled to recover the property of the deceased husband. The Court of Appeal, however, held that the defendants were, under the circumstances, entitled to put the plaintiffs to proof of their title, and were, therefore, entitled to their costs against the plaintiffs. The report sets out in extenso the formal judgment of the Court.

COMPANY—SPECIAL ARRANGEMENT AS TO CALLS AUTHORIZED—DIRECTORS USING POWERS FOR THEIR PERSONAL BENEFIT.

In *Alexander v. Automatic Telephone Co.* (1900) 2 Ch. 56, the Court of Appeal (Lindley, M.R., and Rigby and Williams, L.JJ.) have overruled the decision of Cozens-Hardy, J., (1899) 2 Ch. 302 (noted ante, vol. 35, p. 714). The object of the action was to compel the defendants, who were directors of a joint stock company, to pay the same calls on shares allotted to themselves, as were payable on shares allotted to the plaintiff and the other shareholders of the company. The articles of association authorized the directors to make arrangements on the issue of shares for a difference in the amount of calls to be paid thereon, and the time of payment. The defendants had availed themselves of this provision in respect of shares allotted to themselves and without informing other shareholders thereof, and the Court of Appeal held that directors were not entitled so to use their powers as to obtain benefits for themselves at the expense of the other shareholders without informing them of the facts, and that they could not be allowed to retain those benefits, and must account for them to the company so that all the shareholders might participate therein. A declaratory judgment was accordingly pronounced declaring that the defendants were bound to pay the same calls on their shares as had been made on the shares of the plaintiffs and other shareholders, with liberty to the plaintiff to apply for an order for payment if necessary, and the directors were ordered to pay the costs. The form of the action is discussed by Lindley, M.R., and he held that it was preferable to bring the action in the name of the plaintiff on behalf of himself and the other shareholders other than the directors, against the company and the directors—rather than to bring the action in the name of the company, it being alleged and proved that the directors held a preponderating proportion of the shares, and practically controlled the company.

The Forum.

A CAUSERIE OF THE LAW.

CONDUCTED BY CHARLES MORSE.

"Existe-t-il une société juridique entre les hommes et les animaux?" asks M. Henri Rollin in reviewing M. Englehart's book on the legal rights of the lower animals, ("De l' Animalité et de son Droit"). As our humble energies are more or less absorbed in exploiting the "juridicial relation" between man and man, we shall not undertake to find an answer to M. Rollin's interesting query; but we would venture to suggest that he take out an order to examine, *viva voce*, on the subject, Mr. Kipling's "Shere Khan," or, better still, the shades of those leonine epicures of Marco Polo's day who had a playful habit of breaking in upon Oriental forensic functions, and lunching on the presiding magistracy. The subject is not a new one, for we bear in mind what that brilliant young Canadian, Mr. Ernest Seton Thompson, has to say about it in his preface to "Wild Animals I have Known," viz.: "Since then the animals are creatures with wants and feelings differing in degree only from our own, they surely have their rights. This fact, now beginning to be recognized by the Caucasian world, was emphasized by the Buddhist over 2,000 years ago." But we do not expect to see a practical "animal jurisprudence" such as M. Englehart speculates about, until the millennium has first ended "man's inhumanity to man." We suspect that the hard-headed votary of Themis to-day would look upon the advocate of such a propagandism as Goethe's "Werther" exhumed, or, possibly an impersonation of the "Sentimental Shepherd" of whom the humourist sang:

"I sits wid me toes in a brook
And when they ax me: "For why?"
I hits them a tap wid me crook—
'Tis sentiment kills me, says I!"

* * * In looking over the fine new English edition of the late Dr. Broom's "Legal Maxims" we are reminded of what Sir James Fitzjames Stephen said of the value of legal maxims in his "History of the Criminal Law" (vol. 2 page 94 n. 1): "It seems to me that legal maxims in general are little more than pert headings

to chapters. They are rather minims than maxims, for they give not a particularly great, but a particularly small amount of information. As often as not the exceptions and qualifications to them are more important than the so-called rules." And yet, *mirabile dictu*, at another place in the same work (p. 2, vol. 1) he said: "A judge who wilfully refuses to act upon recognized legal maxims would be liable to impeachment." So we incline to the view that the possession of a "little hoard of maxims" is not a bad property for the man of the law.

* * * Notwithstanding Sir Henry Maine's postulate that "neither ancient law, nor any other source of evidence discloses to us society entirely destitute of the conception of contract" (*Anc. Law*, p. 312), we imagine it to be quite proper to say that a definite system of contract is not to be found in history at an earlier date than the decline of the Roman *regal* period. Contract arises from the relations existing between men in a state of commerce; and trade, as we know it, began its existence in that epoch. It has to be conceded, of course, that the elements of barter and exchange appear at a much more archaic period in history, for instance, take the dealings referred to by Homer in the *Iliad*, VI. 234; VII. 472; and, particularly the transaction mentioned in the *Odyssey*, I. 430. But it was clearly not until after Rome became a great cosmopolitan centre that the normalization of mercantile transactions began. Dr. Muirhead (*Roman Law*, sec. 12, p. 49) says: "To speak of a law of obligations in connection with the *regal* period [of Rome], in the sense in which the words were understood in the later jurisprudence, would be a misapprehension of language. It would be going too far to say, however, as is sometimes done, that before the time of Servius, Rome had no law of contract." Trade, then, may be said to be the mother of contract.

* * * Mr. Pike's latest issue of the "Year Books of Edward III." (Year XVI., pt. II.) contains several features of interest to legal scholars, but perhaps the most notable fact established for them is that at the particular period covered by these records "wager of law" had fallen into obsolescence, and proof per testes prevailed. We have here the record of an action of dower by the widow of one William Oky, in respect of a certain messuage at Coventry. The widow alleged that her husband had died in the army abroad

three years before, and produced a sealed certificate of the Mayor and Commonalty of Bristol to that effect. This evidence was rejected because not given *viva voce*. The widow then promptly produced two witnesses who swore that her husband had died at Ipswich—a *tour de force* which demonstrates that the medieval practitioner was not unresourceful when the exigencies of his case became strenuous.

* * * We have frequently heard it stated that the education of the masses has a tendency to promote crime by making the poor dissatisfied with their narrow surroundings, and creating in them a craving for amenities of life unattainable to them by lawful means. We are glad to be put in possession of satisfactory evidence that such a postulate is untrue, so far, at least, as Great Britain is concerned. In the Home Office Report for 1898, Mr. C. E. Troup furnishes us with statistics showing that since the inauguration in England of a national system of education the volume of crime has steadily ebbed. This answer to the croaking of the reactionary is the more complete in that Mr. Troup is able to show that the diminution of crime is chiefly notable in the departments which have to do with the covetous and furtive instincts in human nature.

* * * Lord Selborne's love and veneration for literature is manifested in his letter of thanks to Tennyson for the latter's dedication to him of the drama "Becket." He declared that this courtesy on the part of the poet was "the greatest real honour" that had ever been done him ; and that the fact that he had won the laureate's friendship and esteem was "more than he could have hoped for." What a contrast, this, to the relations existing between Lord Eldon and Shelley, perhaps the greatest poet of that day ! And what a tribute, too, to the graciousness and goodness of the later period !

 REPORTS AND NOTES OF CASES.

Province of Ontario.

 COURT OF APPEAL.

Practice.] MCKIN v. TOWNSHIP OF EAST LUTHER. [Sept. 19.

Local Masters—Jurisdiction—Referring actions to Drainage Referee.

A Local Master of the High Court has jurisdiction by virtue of Rules 42 and 49—see also Rule 6 (a)—to make an order, under s. 94 of the Municipal Drainage Act, R.S.O. c. 226, referring an action brought in his county to the Referee under the Drainage Laws.

Mabee, Q.C., for appellants. *M. Wilson*, Q.C., for respondent.

Osler, J. A.] IN RE REDDOCK AND CITY OF TORONTO. [Sept. 28.

Appeal—Leave—Judicature Act, s. 77.

Where a motion to quash a municipal by-law was refused by the Judge who heard it, and his order affirmed by a Divisional Court, an application for leave for a further appeal was dismissed.

Held, that, under s. 77 of the Judicature Act, upon such an application for leave, it must appear that there is some reasonable ground for doubting the soundness of the judgment, and in addition thereto, that special reasons exist for taking a case out of the general rule, which forbids more than one appeal to the same party.

F. E. Hodgins, for applicant. *Fullerton*, Q.C., for city.

 HIGH COURT OF JUSTICE.

Ferguson, J.] RE METCALF. [July 10.

Will—Devise of residue—Executory devise—Event happening in part.

A testator by his will gave his wife a life interest in his estate, and at his death some specific legacies, and then provided "The residue * * * I give, devise and bequeath as follows, that is to say: it shall be equally divided between my brothers R. M. and M. M., or in case of their dying before my * * * wife L. M., it shall be equally divided between the heirs of my brothers R. M. and M. M." R. M. died in the lifetime of the widow and M. M. survived her.

Held, that as the event provided for, viz., the death of both R. M. and M. M. during the widow's lifetime had not happened, the devise of the

residue to R. M. and M. M. was not divested, and R. M.'s widow took his share under his will.

R. R. Hall, for appellant. *George J. Sherry, W. A. F. Campbell* and *G. L. Smith*, for other parties.

Ferguson, J.]

HERMAN v. WILSON.

[July 10.

Mining Company—Manager—R.S.O. 1897, c. 197, s. 8—Payments to labourers—Motion to dismiss—Con. Rule 616.

A manager of a company is not a labourer, servant or apprentice within the meaning of R.S.O. 1897, c. 197, s. 8, and an action brought by such a manager, who had recovered a judgment against the company for wages due him and payments made on its behalf to labourers, etc., and had subsequently obtained assignments of the amounts paid the labourers, was dismissed on a motion under Con. Rule No. 616 on the ground that the first action was not such an action as is contemplated by that section.

C. C. Robinson, for motion. *W. J. Elliott*, contra.

Ferguson, J.]

RE WRIGLEY ESTATE.

[July 10.

Will—Devise—To legatee or heirs, executors or assigns—Death of legatee in lifetime of testator—Who entitled—"Heirs"—Next of kin.

A testator by his will after a provision in favour of his wife for life, provided, "At the death of my beloved wife * * any money that may then be remaining * * * shall be equally divided and paid to (two nephews and two nieces, naming them) or their heirs, executors or assigns." One of the nieces predeceased the testator, leaving a husband and children.

Held, that the gift to the deceased niece did not lapse and that her heirs were entitled to her share, and that her heirs were those who would have taken her personal property under the statute of distributions in case of her dying intestate possessed of personal property.

Langmuir, for Toronto General Trusts Corporation. *Edgar, Harcourt* and *Milliken*, for other parties.

Meredith, C. J.]

NELSON v. BELL.

[July 18.

Sale of lands by trustees—Approval of Court—R.S.O. 1897, c. 129, s. 39—Con. Rule 938.

Trustees having unsuccessfully offered for sale estate property consisting of a block (hotel and stores) and a dock together, and subsequently the hotel and stores together, received an offer for the hotel by itself.

Held, on an application to the Court to approve and confirm the sale under R.S.O. 1897, c. 129, s. 39, and Con. Rule 938, that the Court had

jurisdiction to express its approval and that under the circumstances it was a case in which the jurisdiction ought to be exercised.

W. H. Blake, for trustees. *Dr. Hoskin*, Q.C., for infant. No one for widow.

Meredith, J.]

BOOK v. BOOK.

[August 29.

Life insurance—Change of beneficiary—Preferred class—Beneficiary for value—R.S.O. c. 203, ss. 151, 159, 160—Will—Testamentary capacity—Premiums paid by beneficiary.

A person whose life was insured by a benevolent society in favour of his wife, a preferred beneficiary, though not stated to be so in the certificate, was unable or unwilling to keep the insurance in force, and the later assessments, before his death, were paid by the wife. By his will the assured gave the whole of the insurance money to one of his sons.

Held, that he had power to do so by virtue of s. 160 of the Ontario Insurance Act, R.S.O. c. 203.

The proviso at the end of sub-s. (2) shews that the section is applicable to the case of a beneficiary for value, and that those only who appear as such expressly in the policy are protected against the wide power to change beneficiaries conferred by the section.

Section 159 does not apply to a case of this kind, but only to a pledge of a policy before it has been declared to be for the benefit of any preferred beneficiary.

Section 151 is not to be read as conflicting with s. 160; the latter applies to a change confined to the class of preferred beneficiaries, and the former to a change in all other cases.

Held, also, that the evidence did not sustain the allegation that the testator's mind was affected by insane delusions respecting his wife and some of his children; nor the theory that there was an abandonment of the husband's insurance on his own life and the substitution of an insurance by the wife upon his life. It was conceded that the wife should have a return of all moneys paid by her to keep the certificate in force, with interest.

Tietzel, Q.C., for plaintiff. *W. W. Osborne*, for defendants.

Meredith, J.]

BOGART v. TOWNSHIP OF KING.

[August 29.

Assessment and taxes—Special rate—Bonus by-law—Duty of clerk—Collector's roll—Debentures, sale of—Failure of scheme.

Where a by-law of a township corporation provided for the raising by the issue and sale of debentures of a certain sum to be paid by way of bonus to a railway company, and for the levying of an annual rate for the purpose of paying the debentures.

Held—1. It was the duty of the township clerk under s. 129 of the Assessment Act, without any further direction or authorization, to insert in the collector's rolls the amount with which each ratepayer was chargeable under such by-law; and it was not necessary that the amount levied each year under such by-law should be mentioned in the annual by-law authorizing the levy of sums for ordinary expenditure; and s. 402 of the Municipal Act had not the effect of making it necessary. *Clarke v. Town of Palmerston*, 6 O.R. 616, distinguished.

2. The rate could be levied notwithstanding that none of the debentures had been sold.

3. The failure to collect the rate for the first year after the passing of the by-law did not cause the failure of the whole scheme.

Semble, that if the scheme should fail and nothing be paid to the railway company, the ratepayers could recover their money from the corporation.

S. H. Blake, Q.C., and *T. H. Lloyd*, for plaintiff. *Shepley*, Q.C., and *A. B. Armstrong*, for defendants.

Meredith, J.]

[August 29.

GRAND TRUNK R.W. CO. v. CITY OF TORONTO.

Constitutional law—Railways—Municipal corporations—Construction of highway across railway—Railway Committee of Privy Council—Railway Act of Canada, s. 14—Intra vires.

Upon the application of the defendants under s. 14 of the Railway Act of Canada for an order authorizing the extension of a street in their city across the tracks of the plaintiffs, the Railway Committee of the Privy Council for Canada ordered and directed that the defendants "may have a temporary crossing, at rail level, for foot passengers only, over the said tracks," upon certain conditions.

Held—1. The Provincial Legislature alone had power to confer upon the defendants legal capacity to acquire and make the street in question.

2. It has conferred such capacity.

3. In virtue of its power over property and civil rights in the province, the Provincial Legislature has power to authorize a municipality to acquire and make such a street, and to provide how and upon what terms it may be acquired and made.

4. But that power is subject to the supervision of Federal legislation respecting works and undertakings such as the railway in question.

5. The manner and terms of acquiring and making such street, and also the prevention of the making or acquiring of such a street, are proper subjects of such supervening legislature.

6. Such legislation may rightly confer upon any person or body the power to determine in what circumstances, and how and upon what terms,

such a street may be acquired and made, or to prevent the acquiring and making of it altogether, and therefore s. 14 of the Railway Act is not ultra vires.

7. Such legislation, in virtue of its power over such railway corporations, as well as such works and undertakings, may confer power to impose such terms as have in this case been imposed upon the plaintiffs, and to deprive such corporations of any right to compensation for lands so taken or injuriously affected; and has conferred such power on the Railway Committee, under s. 14, in such a case as this; which power has been exercised to some extent.

8. Such legislation has not conferred upon the committee power to give the temporary footway in question.

9. Nor any authority to delegate its powers.

10. The work it directs must be constructed under the supervision of an official appointed for that purpose by the committee.

11. The railway company may, if they choose, construct the works directed, under such supervision, instead of permitting the municipality to do so.

H. S. Osler, for plaintiffs. *Fullerton*, Q.C., for defendants.

Meredith, J.] In RE HYNES—HODGINS v. ANDREWS. [August 29.
*Partition — Summary proceeding — Parties — Absentee — Guardian —
 Dispensing with service—Substituted service.*

Where, in a proceeding for partition or sale of lands, begun by summary application, a person interested in the estate, not originally made a party, had been long unheard of, and there was uncertainty whether he were living or dead, an order was made by a judge, under ss. 16 to 20 of the Partition Act, R.S.O. c. 123, which are expressly made applicable by s. 33 of the Judicature Act, R.S.O. c. 51, appointing a guardian and directing that he be served with an office copy of the judgment or order for partition and notice for the absentee.

Semble, that the Master to whom a reference is directed by the judgment or order has power to dispense with service of his warrant or of an office copy of the judgment: Rules 203, 659. *Smith v. Houston*, 15 P.R. 18, discussed.

Semble, also, that the court or judge has power to make an order for substituted service of an office copy of a judgment or order.

Coleridge, for plaintiff. *Essery*, for defendants.

Meredith, J.] DICKERSON v. RADCLIFFE. [August 30.
Costs—Interlocutory order—"Costs in the cause"—Discretion of trial judge.

Where an interlocutory order in an action directs that the costs of certain proceedings shall be "costs in the cause," that is not a final

disposition of such costs in favour of the party who shall succeed in the action, but merely puts these costs in the same position as any other of the ordinary costs of the action, that is, leaves them to be dealt with in the discretion of the trial judge under Rule 1130 and s. 119 of the Judicature Act, R.S.O. c. 51.

Koosen v. Rose (1897), W.N. 25, 76 L.T. 145, 45 W.R. 137, 13 Times L.R. 257, distinguished.

J. W. Bain, for plaintiffs. *J. B. Holden*, for defendants.

Armour, C. J., Falconbridge, J., Street, J.]

[Sept. 8.

WILSON v. FLEMING.

Evidence—Cross-examination on affidavit—Proper questions—Attachment of debts—Salary of municipal officer—Advances—By-law—Production.

An order having been made attaching all debts due to a judgment debtor by a city corporation, a person describing himself as "paying teller" of the corporation made an affidavit in answer to the judgment creditor's application for a garnishing order absolute, stating that nothing was due from the corporation to the debtor at the time of service of the attaching order. Cross-examined upon his affidavit the affiant said that the debtor was assessment commissioner for the corporation and in receipt of a salary, but that advances had been made to him on account of it, by the authority of the treasurer of the city, so that nothing was due. The affiant declined to answer certain questions put to him on cross-examination.

Held, 1. The affiant should be compelled to answer all questions put to him bearing on the advances made in the past to the debtor, and those bearing on the affiant's authority to make them, and his motives in doing so if he were exercising a discretion.

2. (STREET, J., dissenting), The affiant should answer the question whether he had ever made advances on account of salary to any other employee of the city, and, if he should answer it in the affirmative, he might be further interrogated as to the number of such instances, but he was not to be compelled to disclose the names of persons to whom such advances had been made.

3. The affiant was not compellable to produce any of the city by-laws, not being the custodian thereof.

S. W. McKeown, for judgment creditor. *Lindsey*, Q.C., for judgment debtor and witness. *H. L. Drayton*, for garnishees.

Rose, J.]

IN RE VANLUVEN AND WALKER.

[Sept. 11.

Costs—Taxation—Mortgagor and mortgagee—Appeal.

No appeal lies from the taxation of a mortgagee's costs of proceedings under the power of sale in a mortgage had under R.S.O. c. 121, s. 30.

A. R. Clute, for mortgagor. *J. H. Moss*, for mortgagee.

Falconbridge, J., Street, J.]

[Sept. 15.]

TOWNSHIP OF TILBURY WEST v. TOWNSHIP OF ROMNEY.

Stay of proceedings—Prior action pending—Parties.

In this action the plaintiffs sought to recover from the defendants a large sum of money, being the portion assessed upon the defendants of the cost of certain drainage works constructed and paid for by the plaintiffs. In a previous action against the same defendants, the plaintiffs therein, who were land-owners in the defendants' township and assessed for a portion of the sum now sued for, sought a declaration that the defendants' by-laws purporting to impose this assessment upon the plaintiffs therein, and all the proceedings upon which they were founded, were void, and for an injunction to restrain any proceedings for the collection of the amount for which the plaintiffs therein were assessed. In that action judgment had been given in the defendants' favor, but the plaintiffs had an appeal to the Supreme Court of Canada pending when the present action was brought.

Held, that the present action should not be stayed until after the determination of the appeal in the other.

Du Vernet, for plaintiffs. *Aylesworth*, Q.C., for defendants.

Rose, J.]

MURR v. SQUIRE.

[Sept. 17.]

Costs—Interlocutory order—“Costs in the cause”—Discretion of trial judge.

The judgment of the trial judge was in favour of the plaintiff, and was not appealed against. As to costs, it adjudged that the defendant should pay to the plaintiff the costs of certain witnesses, and continued: “This Court doth not see fit to interfere with the interlocutory orders disposing of certain costs throughout the action, nor make any further or other order as to costs.”

Two interlocutory orders made the costs of applications “costs in the cause;” two made them “costs in the cause to the successful party;” one order provided “that the defendant do pay to the plaintiff the costs of this motion to be taxed in any event of the cause but on the final taxation of the costs herein.”

It was conceded that the plaintiff was entitled to the costs made payable in any event.

Held, following *Dickerson v. Radcliffe* (decision of Meredith, J., of 30th August, 1900), that the costs made costs in the cause were subject to the disposition of the trial judge, and under the judgment were not to be taxed to the plaintiff.

Held, also, that “costs in the cause to the successful party” did not mean more than costs in the cause; and, even if it did, the plaintiff was not a successful party.

Brotherton v. Metropolitan District Railway Joint Committee (1894),
1 Q. B. 666, followed.

R. McKay, for plaintiff. *J. H. Moss*, for defendant.

Rose, J.]

IN RE HUBBELL.

[Sept. 19.

Interpleader issue—Parties—Onus.

Where the proceeds of a life insurance policy were claimed by the widow of the assured and also by an assignee for value, and it appeared that the assured had first made a declaration in writing on the policy devoting all the benefit to his wife, and had subsequently by writing assumed to limit such benefit to \$1 and had then made the assignment to the other claimant :—

Held, that the latter should be plaintiff in an interpleader issue ordered to be tried between the claimants.

H. M. Mowat, Q.C., for Hubbell. *A. G. Slaght*, for Russell. *W. F. Burton*, for Insurance Company.

Rose, J.]

EDSALL *v.* WRAY.

[Sept. 22.

Venue—Residence of plaintiff—Statement of claim—Rule 529 (b).

Rule 529 provides that : (a) the plaintiff shall, in his statement of claim, name the county town at which he proposes that the action shall be tried ; (b) where the cause of action arose and the parties reside in the same county, the place so to be named shall be the county town of that county.

Held, that the residence of the plaintiff at the time of the delivery of the statement of claim, and not at the time of the issue of the writ of summons, is the time referred to in Rule 529 (b).

W. H. Blake, for defendant. *Cattanach*, for plaintiff.

Meredith, C.J.]

STEWART *v.* JONES.

[Sept. 22.

Receiver—Equitable execution—Claim against Crown—Distribution of fund—Creditors' Relief Act—Undertaking.

The plaintiff and defendant were partners, and as such had a claim against the Crown for work done, which resulted in the payment of a large sum. Subsequently the partnership made a further claim for interest on the sum paid, which was rejected, and could not have been enforced by a petition of right. The Crown, however, without admitting any liability, offered a sum in satisfaction of the claim for interest, and an appropriation was made by Parliament to enable that to be done, but the appropriation lapsed. A Minister of the Crown afterwards offered to pay the defendant

half the amount of the appropriation, and the defendant agreed to accept it. Accordingly a sum was granted by Parliament for this purpose, and, by an order-in-council, authority was granted to pay it to the defendant.

Held, that on the date of the order-in-council there existed a debt due by the Crown to the defendant, arising out of contract, and recoverable by petition of right.

Held, also, that this sum could be made available for satisfaction of a judgment recovered by the plaintiff against the defendant.

Willcock v. Terrell, 3 Ex. D. 323, and *Manning v. Mullins* (1898), 2 Ir. R. 34, followed.

The fact that the Crown is the debtor does not stand in the way of the court going as far as it can go, without directing or assuming to direct what shall be done by the Crown, towards making such an asset of a judgment debtor available to satisfy the claim of his judgment creditor.

Upon the plaintiff undertaking that the fund, if and when it should come to the hands of the receiver, should be applied as if it had come to the hands of the sheriff under the Creditors' Relief Act, an order was made restraining the defendant from receiving the fund, authorizing a receiver to receive it, and providing that his receipt should be a sufficient discharge to the department or officer making payment.

J. H. Moss, for plaintiff. *Shepley, Q. C.*, for defendant. *J. A. Paterson*, for the Crown.

Meredith, J.]

TOLTON v. MACGREGOR.

[Sept. 24.

Payment out of court—Proof of age of applicant.

By decree of the 18th September, 1878, in a partition action, it was directed that the share of an infant defendant, J. F. M., should remain in court, and the interest thereon should be paid to his father, a co-defendant, as tenant by the curtesy.

On the 24th September, 1900, J. F. M. and his father moved for payment out of J. F. M.'s share, upon the father's affidavit identifying the infant defendant as his son, J. F. M., and stating that J. F. M. was of age, having reached the age of twenty-one years on the 5th February, 1899, and that the father consented to payment out and released all his rights in the fund.

Held, that the proof of the age was not sufficient, the father not having stated his reasons for believing that the son was of age, or referred to any family or other records in support of his statement, and the fact that the son was named as a party in the decree of 18th September, 1878, was not conclusive proof that he was now of age.

H. W. Mickle, for applicants.

Meredith, J.] MACDONALD v. MAIL PRINTING CO. [Sept. 28.

Trial—Nonsuit after verdict—Libel—Innuendoes—Onus—Evidence for jury—Newspaper—Report of speech—“Blackmailing,” meaning of—Truth of defamatory words.

Where in the course of the trial of an action before a judge and jury a motion for a nonsuit is made at the close of the plaintiff's case, and again at the close of the whole evidence, and the judge adopts the course of taking a verdict, and of fully hearing and considering the motion, if necessary, after the verdict, the judge may, in a proper case, nonsuit the plaintiff, notwithstanding a verdict of the jury in his favour.

Perkins v. Dangerfield, 51 L. T. N. S. 353, and *Moore v. Connecticut Mutual Ins. Co.*, 6 App. Cas. 644, distinguished. *Floer v. Michigan Central R. W. Co.*, 27 A. R. at p. 127, referred to.

In an action for libel the words complained of were: “It can readily be understood what interest Mr. M. has in the matter, and why he should make advances, hire committee rooms, and generally control the campaign, when \$4,000,000, which he controls, will be made available if E. A. Macdonald (the plaintiff) can be elected mayor. In addition to this, Mr. M. has between \$7,000 and \$10,000 of claims against Macdonald, which, in proceedings, it was shown under oath of Mr. M. that he hoped to be paid, should he succeed in qualifying Macdonald for mayor, and then electing him.”

The innuendo was that the defendants charged the plaintiff with having “entered into a corrupt arrangement” with one M., “whereby the plaintiff should use the office of mayor, when elected, for private gain,” and with having “unlawfully and corruptly influenced, or attempted to influence the said M. to support him in the mayoralty campaign, both financially and otherwise,” and with being “unlawfully and corruptly influenced” by said M. “to use the said office of mayor to improperly advance the pecuniary and private undertakings of said M.”

Held, that, there being no evidence, apart from the newspaper article in which they appeared, to shew that the words bore any other than their ordinary meaning, the onus of proof of the innuendo was not satisfied; there was no reasonable evidence to go to the jury that the words conveyed the meaning which the plaintiff attributed to them.

The plaintiff also complained of a statement published by the defendants that a speaker at a public meeting “characterized” the plaintiff's behaviour as “blackmailing.” The defendants pleaded the truth of the words used.

Held, that it made no difference that the defendants were only reporting, or purporting to report, the words of another, or whether the report was accurate or inaccurate—that question arises on a defence of fair and accurate report only. If the words were true, the plaintiff could not recover.

The word "blackmailing" should not, at the present day, and in this country, be limited in its meaning to the case of the crime of extortion by threats or any other crime.

Where a man, having no right, nor any pretence of right, to receive one farthing (except his proper law costs, if he succeed in the action) receives \$4,500 to push a complaint of, and to stifle his legal proceedings to prevent, a wrong which he charges is about to be perpetrated by means of audacious bribery of public officers, his conduct may be "characterized as blackmailing" in the proper and ordinary meaning of these words.

There being no evidence of the falsity of the words used, but they appearing, upon uncontroverted evidence, to be true, the plaintiff's case failed.

Semble, also, that the innuendoes that the plaintiff had "committed a crime punishable by law," that he was "unworthy of any position of trust," and that he "was a blackmailer," could not be supported.

Quære, whether the plaintiff, having chosen to put his own interpretation upon the words, and to bring the defendants down to trial upon that interpretation, and to try the case out accordingly, could be permitted subsequently to reject the innuendoes and rely upon the words (if untrue) having another libellous meaning, whether libellous in themselves or not.

The respective functions of judge and jury are in an action of libel in no way different from such functions in other actions, except for the statutory provision in favour of a defendant, R.S.O. c. 68, s. 2.

It is the duty of the court to consider whether there is any reasonable evidence to go to the jury, and, if not, to dismiss the action.

E. F. B. Johnston, Q.C., and Bradford, for plaintiff. J. B. Clarke, Q.C., and Swabev, for defendants.

Falconbridge, C.J., Street, J.]

[Sept. 29.

INDEPENDENT ORDER OF FORESTERS v. BEGG.

Mortgage—Foreclosure—Mortgagee in possession—Account of rents—New day—Final order—Rights of purchaser after decree—Parties—Power of sale.

Mortgagees had been in possession of several of the parcels of land comprised in their mortgage before they commenced an action for foreclosure. In that action the usual judgment was pronounced, and while the reference thereunder was pending the plaintiffs agreed to sell some of the parcels to B. in case the mortgagors should not redeem; and B. went into possession. The Master made his report on the 13th February, 1900, fixing the 14th August, 1900, as the day for redemption, and ascertaining the amount due by the defendants up to that day. On the 15th May an order was made amending the report by deducting amounts received by the plaintiffs for rent, and directing that any other

rents received up to that time should be credited on the final adjustment. On the 15th August the defendants applied for a new day, when the plaintiffs stated on affidavit that sums paid by them for taxes and costs more than exhausted the rents received since the date of the report. No other statement was made by the plaintiffs. The application was refused, and on the 17th August a final order of foreclosure was granted.

Held, that the statement of the plaintiffs was insufficient; the mortgagor, before a final order of foreclosure is made, is entitled to know how much he must pay in order that he may redeem, and the modes in which that amount may be ascertained, where it has been changed after report, are pointed out in Rule 387.

Held, also, that a purchaser who has purchased during the pendency of foreclosure proceedings, and whose rights are expressly subject to the termination of the proceedings by a final order of the Court in favour of the mortgagee, stands in a different position from one who comes in for the first time after a final order has been made, and is much more readily made subject to the discretion of the Court to open the foreclosure. *Campbell v. Holyland*, 7 Ch. D. 166, and *Johnston v. Johnston*, 9 P. R. 259, followed. *Gunn v. Doble*, 15 Gr. 655, distinguished.

In this case the mortgagors were in no default. The slightest examination of the proceedings on the part of the purchaser would have shown him that the mortgagors had never been properly foreclosed, and that no day had ever been fixed for payment of the balance due the mortgagees; but he did not even ask whether a final order had been obtained, which was the condition upon which his sale was to be carried out.

Held, therefore, that the mortgagors had a clear right to redeem; and, having come in promptly for relief and taken vigorous steps to assert their rights, they were entitled to have the final order of foreclosure set aside, a new account taken and a new day fixed, and to redeem both as against the plaintiffs and B., for which purpose the latter should be added as a party.

Held, lastly, that the sale to B. was not, under the circumstances, sustainable under the power of sale contained in the plaintiff's mortgage. *Kelly v. Imperial Loan Co.*, 11 S.C.R. 516, distinguished.

J. Bicknell, for plaintiffs. *W. H. Blake* and *S. B. Woods*, for defendants. *Aylesworth*, Q.C., for purchaser.

Province of Nova Scotia.

SUPREME COURT.

Ritchie, E. J., in Chambers.]

[Sept. 21.

BALCOM V. CROFT.

Change of venue.

Motion to change the venue. The statement of claim had been delivered and the defence put in, but no reply had been delivered.

Held, on the authority of *Read v. Henderson*, 20 N.S.R., which held that the application there was premature, that an application of this nature should not be made until after issue joined, or until it was clearly ascertained what the issues would be, that the reply not having been delivered, and that new issues might be raised by the same when delivered, the application was premature, and the motion should be dismissed with leave to move again when the cause was at issue.

J. A. McLean, Q.C., for applicant. *F. B. Wade*, Q.C., *contra*.

Ritchie, E. J., in Chambers.]

[Sept. 21.

FORBES V. PEARSON.

Particulars—Partnership.

Application for further particulars of plaintiff's claim as regards the partnership agreement in question.

Held, that any terms and conditions of the partnership agreement other than those set out in the statement of claim were not particulars of such claim, and therefore could not be obtained by the defendant in this way if he wished to make them available as a defence.

Held, further, that defendant could not obtain particulars of transactions by which plaintiff alleged defendant became possessed of partnership funds. *Augustinus v. Nerinck*, L.R. 16 Ch. D. 13 followed.

R. E. Harris, Q.C., for applicant. *F. B. Wade*, Q.C., and *F. T. Congdon*, *contra*.

Province of British Columbia.

SUPREME COURT.

Irving J.]

McCLARY v. HOWLAND.

[Sept. 11.]

Practice—Security for costs—Joint plaintiffs, one an extra-provincial company—R.S.B.C. 1897, c. 44, s. 144.

Summons for security for costs. The McClary Manufacturing Company was an extra-provincial company, having valuable assets in the province, and the plaintiff Drake was resident within the province.

Held, that an extra-provincial company must give security for costs under R.S.B.C. 1897, c. 44, s. 144, notwithstanding it is suing along with a resident of the province, and has assets within the province. Security ordered in the sum of \$200.00.

Kappele, for the summons. *Bloomfield*, contra.

Martin, J.]

ATTORNEY-GENERAL v. DUNLOP.

[August 15.]

Practice—Judgment—When delivered.

After the trial of the action of *Dunlop v. Haney* in Vancouver, judgment was reserved by MARTIN, J., who then went to Victoria, subsequently reduced his judgment to writing, and signed it on August 11th, 1899, and enclosed it in an envelope with a covering letter directed to the District Registrar at Vancouver. The letter should have reached the District Registrar early the next morning, according to the regular course of the mails, but the office receipt stamp of the Vancouver Registry stamped on the judgment bore date August 15th, 1899.

For the determination of the present action it became necessary to decide when the judgment in *Dunlop v. Haney* was pronounced.

Held, that judgment was pronounced on 11th August, 1899, when the matter was finally determined so far as the Judge was concerned; and that the parties to the action could not be prejudiced by any delay in the Registry or the Post Office.

Book Reviews.

A Collection of Legal Maxims, Classified and illustrated by Herbert Broom, LL.D., seventh edition, by Herbert F. Manisty, LL.B., and Herbert Chitty, M.A., barristers-at-Law: London; Sweet & Maxwell, Limited, 3 Chancery Lane, Law Publishers.

The first edition of this book was published in 1845, and obtained a wide circulation as a text-book for students. Five editions were produced by Dr. Broom himself and a sixth edition two years after his death was published by Mr. Manisty and Mr. Cagney. The main idea of the work is to present under the heading of maxims certain leading principles of English law, and to illustrate some of the ways in which those principles have been applied by reference to a selection of reported cases. The author's idea has been maintained in this the last edition. Whilst more particularly used by students, this work is often found very helpful to the practicing barrister, and is of course a standard work without which no law library would be complete. The editors acknowledge valuable assistance from a copy of the second edition noted up by Lord Lindley and kindly lent to them by him.

The Law Magazine and Review, August, 1900: London; J. G. Hammond & Co., Limited, 161 Strand, W. C.

This number of this excellent periodical contains the following articles: Solicitors and Reform—Notes on the Early History of Legal Studies in England—Privileged communications, husband and wife—Suzerainty, mediæval and modern—Criminal statistics, 1898, in which the writer comes to the conclusion that crime is, on the whole, diminishing; We must say, however, the reasoning does not seem to us to warrant the conclusion. Another article discusses the limited liability of landlords, where the ground is taken that landlords should be held to impliedly warrant fitness for habitation of their premises during the whole of the hiring, and be made liable for damage resulting from every cause directly attributable to the condition of the premises, not due to any omission or act on the part of the tenant.

Flotsam and Jetsam.

A new military prison chaplain was recently appointed in a certain town in Scotland, and entering one of the cells on his first round of inspection, he, with much pomposity, thus addressed the prisoner who occupied it: "Well, sir, do you know who I am?" "No, nor I dinna care," was the nonchalant reply. "Well, I'm your new chaplain." "Oh, ye are; well, I hae heard o' ye before." "And what did you hear?" returned the chaplain, his curiosity getting the better of his dignity. "Well, I heard that the last twa kirks ye were in ye preached them baith empty, but I'll be hanged if ye find it such an easy matter to do the same here."—*Argonaut*.

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NO. 21.

The vacancy in the Ontario Bench is still unfilled, to the inconvenience of litigants and thereby throwing an undue pressure of work on the other judges. It is high time that an appointment was made. We have been told that it may be expected shortly, as the Dominion elections will soon be over, which remark to some would seem to convey more than meets the ear. From a political standpoint there may be a good reason for the delay; but that is not a satisfactory excuse from other points of view.

Some of our contemporaries amuse themselves with foreshadowing appointments of this or that man, based on conjectures as to his religious proclivities. We are sorry to see such ideas prevalent inasmuch as they tend to create the impression that those in authority are justified in making appointments on such grounds, instead of those of personal and professional fitness for the office. To appoint a man a judge because he happens to belong to a particular creed, apart from the question of his personal and professional fitness for the office, is an abuse of power, a prostitution of the office, and a gross injustice to the community.

A valued correspondent from Hamilton, in a letter which we publish in this number (post p. 630), calls attention to a very important matter, and one which we have already referred to in these columns. He very properly characterizes sec. 606, sub-s. 3, of the Municipal Act, as a most iniquitous provision. How it ever came on the statute books is a marvel. It should at once be amended. We are glad to know that the attention of the Municipal Committee was called to this matter last session, and it was very nearly struck out on that occasion, but coming up at the close, there was not time to give it sufficient consideration. We trust that some member will make a point of seeing to this next session; though very possibly after what was said about it in committee, the Government may have a clause drafted to make necessary amendments, possibly in the direction suggested by Mr. Farmer.

We have much pleasure in publishing in another place a letter from the Police Magistrate of the city of Toronto in answer to our remarks on page 517 ante. The personal matters referred to in the discussion are of no special interest. If we have, as we are told, made some mistakes in unimportant matters, we are glad to be corrected. Many of our readers know the facts and can be the judges. Our object was to repudiate as most unfair and injurious wholesale charges of wrongdoing against the profession. We now understand, from the letter, that the strictures we referred to were not meant to convey the meaning that we, with other members of the profession, took from them.

Preliminaries having been thus disposed of entirely to his satisfaction the gallant Colonel proceeds to draw a vivid picture, (with poetic licenses) of the long drawn out agonies of a law suit, from the time when the reckless, not to say wicked, lawyer sets the machinery of the Courts in motion until the time when the paupered client dies of a broken heart. He also very properly gives his views as to the best way of reforming the abuses in the administration of justice which lead to such unhappy results, and speaks of two possibilities in that connection. One is, that the State should look after all litigation, hiring lawyers at fixed salaries to assist the judges. As an alternative proposition, he throws out a hint as to the propriety of deciding disputes by the tossing of a copper. The first suggestion is not original, and reads like a chapter intended for a revised edition of Bellamy's "Looking backward." The idea, however, of organizing a "Copper-tossing Bureau" is quite novel, and worthy of consideration as being both simple and economical. It would, moreover, appeal to the gambling spirit of the age. We should be glad if our correspondent would elaborate this idea a little. Parliament will soon meet, and the matter might be introduced. It would at least produce a discussion quite as interesting and useful as many of those which now occupy the time of our law-makers.

The *Albany Law Journal* notes a recent decision of the Supreme Court of Minnesota in *Cunningham v. Cunningham*, as to the meaning of the words "in the presence of the testator" in connection with the execution of a will. It appears after the paper had been signed it was taken into an adjoining room where the witnesses affixed their signatures at a table about ten feet from the testator.

The door was open, and he could have seen the table had he stepped forward two or three feet, but he did not do so. The will was immediately taken back to the testator, the signatures of the witnesses were pointed out to him, and he looked over the paper and pronounced it correct. The Supreme Court, in holding that there had been substantial and satisfactory compliance with the statute, took occasion to say that the courts have often placed themselves in absurd and inconsistent positions in construing the words referred to; that in the case at bar the signing took place within the sound of the testator's voice; that he knew what was being done, and that when the signatures of the attesting witnesses were pointed out to him he took the instrument in his own hands, looked over it and pronounced it satisfactory, which made the whole proceeding a single and entire transaction, and formed a sufficient compliance with the statute.

THE HOME-COMING.

Oh ! may that day with whitest stone be marked,
When at their country's call her sons came forth,
And at her feet their lives and fortunes laid,
Her honor to defend; that debt to pay
Which every faithful man to country owes.
Alas ! by some that debt is fully paid
Who their devotion, with their life-blood, sealed.
Oh ! gallant hearts, oh ! brave and faithful sons !
Your death is not in vain but shall inspire,
In ages yet to come, the martial fire,
And deeds of valour oft again incite.
And ye who from the toil and stress of war
Have safe returned, we welcome to your homes,
And to our hearts we take you with delight.

CONTRACTS IN RESTRAINT OF TRADE.

The elasticity of the common law to adapt itself to the altered circumstances of commercial expansion finds striking illustration in cases of what are technically known as contracts in restraint of trade.

In the reign of Henry V., in the early part of the fifteenth century, it will be seen by reference to the Year Books, it was even then old and settled law, founded upon public policy for the good of the realm, that contracts which had the effect of limiting the skill or handicraft of the industrial classes, or which tended to favour monopolies and exclusive privileges, were void. The reason of the rule was, such contracts were inimical to the public weal, in consequence of depriving the public of the services of such as were skilled in employments beneficial to the state. The tendency of such contracts, likewise, was to prevent competition and enhance prices. A case occurred in the 2nd Henry V., found in the Year Book of that date, in which damages were sought for breach of a bond with a condition that a man should not exercise his craft of a dyer for the period of six months, within a certain town. Mr. Justice Hall, who tried the case, angered at such a violation of the law, with an oath announced, "If the plaintiff were present in court, to prison he should go until he made fine to the king, because he had dared to restrain the liberty of the subject." Two principles from the first seemed to antagonize each other. One holding the state should not be deprived of the talent, skill and labour of any of its members by any contract he might enter into. The other, that courts should not lightly interfere with freedom of contract, which when freely entered into should, as far as possible, be held sacred. It has justly been said, freedom of trade and inviolability of contract are alike favourites of public policy. There has long been a constant effort to harmonize those conflicting principles. The hard and fast rule of earlier cases of contract in restraint of trade has gradually relaxed with the ever changing phases of commercial intercourse, and seeks, while protecting the rights of the contracting parties, to conform to modern views and ideas of public policy.

In 1621 an exception was grafted upon this old established maxim of the common law. The defendant in *Broad v. Jollyfe*, Croke, 17 Jac. p. 596, was a mercer, who kept shop at Newport, Isle of Wight. In consideration plaintiff would buy all the wares

in his shop, he agreed he would not any longer keep a shop in Newport. Plaintiff recovered damages on breach of his agreement. The court held, on motion in arrest of judgment, that one upon a valuable consideration might restrain himself from using his trade in a particular place.

In 1711, the great leading case of *Mitchell v. Reynolds*, 1 William Peare Williams, p. 181, re-affirmed this principle of distinction between limited and general restraint, and settled the further question, which had long been a subject of controversy in the courts, that it mattered not whether the agreement was or was not under seal. In this case the defendant bound himself by his bond under the penalty of £50 not to exercise the trade of a baker in the parish of St. Andrews, Holborn, for the term of five years. The judgment of the court was, the plaintiff ought to have judgment for breach of the bond. In an exhaustive judgment, in which all the cases were carefully weighed and considered, the Chief Justice, Lord Macclesfield, decided, that all restraints of trade, if nothing more appeared, were bad; but if the restraint were only particular in respect to the time or place, and sufficient consideration was given to the party restrained, such contract was good and valid in law. From this time forward, for more than a century, the courts with great uniformity held that contracts in general restraint of trade were void; while those in partial restraint thereof were valid, provided they were supported by a sufficient consideration.

Chief Justice Best, in *Homer v. Ashford* (1825), 3 Bingham, p. 322, thus clearly defines the old rule and the first leading exception: "The law will not permit anyone to restrain a person from doing what the public welfare and his own interest requires that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking in the kingdom, would be void, because no good reason can be imagined for any person imposing such a restraint on himself. But it may often happen (and the present case is a strong instance of it) that individual interest, and general convenience, render engagements not to carry on trade or to act in a profession in a particular place proper. . . . For partial restraints, however, there must be some consideration, otherwise they are impolitic and oppressive. What amounts to an adequate consideration is to be decided by the courts of justice."

Just here it may not be amiss to indicate the meaning of these

terms as defined by the judges. According to Bowen, L.J.:—"Contracts in general restraint of trade may be defined as those by which a person restrains himself from all exercise of his trade in any part of England. A mere limit in time has never been held to convert a covenant in general restraint of trade into a covenant of particular or partial restraint of trade." According to C. J. Parker:—"A partial restraint of trade is one in which there is some limitation in respect of person, place or of the mode or manner in which a trade is carried on."

The year 1837 marked another important exception to the old common law rule, for in this year it was held by the Court of Exchequer Chambers, on error from the Court of King's Bench, in the case of *Hitchcock v. Coker*, 6 A. & E. p. 438, that the court would not enter into the question whether the consideration was equal in value to the restraint agreed to by the defendant. Up to this time courts had been astute in enquiry as to the adequacy of the consideration, holding the covenant or agreement void, if a sufficient consideration had not been established. This case has justly been called a landmark in the law. The following extract from the considered judgment of Tindal, C.J., which contains a valuable epitome of general principles on the question, is well worthy of careful perusal: "But, if by adequacy of consideration, more is intended, and that the court must weigh whether the consideration is equal in value to that which the party gives up or loses by the restraint under which he has placed himself, we feel ourselves bound to differ from that doctrine. A duty would thereby be imposed upon the court, in every particular case, which it has no means whatever to execute. . . . It is enough, as it appears to us, that there actually is a consideration for the bargain; and that such consideration is a legal consideration, and of some value." This case, in addition to deciding that adequacy of consideration was not essential to support a contract in restraint of trade, also decided that the covenant or agreement would not be void, merely on the ground it was unlimited as to time.

Public policy, it would seem, for some time, had been setting in the direction of the utmost possible limit of freedom of contract. While many judges favoured this view, others were disposed to hasten slowly, and from time to time did not fail to put up a cautionary signal, and in a warning way refer to the well-known dictum of Mr Justice Burrough:—"That public policy is a very

unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law": *Richardson v. Mellish*, 2 Bing. 229.

From 1711, the time of the decision of *Mitchel v. Reynolds*, down to 1840, it was uniformly held, that contracts in restraint of trade generally were void; while those limited as to place or persons were regarded as valid and duly enforced. In 1840 by a decision in the Court of Chancery, *Whittaker v. Howe*, 3 Beavan, p. 383, the old rule was subjected to further exceptions. In this case, Lord Langdale, Master of the Rolls, entirely ignored the rule as to the necessity for a limit of space and held an agreement of a solicitor, for valuable consideration, not to practice as a solicitor in any part of Great Britain for twenty years valid, and granted an interlocutory injunction to restrain a breach of the agreement. According to the definition already given such a restraint would be general. Lord Langdale held the question turned upon the fact whether the restraint intended to be imposed on the defendant was reasonable. This judgment, however, was subjected to criticism by Lord Justice Bowen in *The Maxim Nordenfelt case* hereafter referred to. His Lordship thus referred to it:—"The covenant was not a covenant in partial but in general restraint of trade; and the restraint of trade being a general one, the court had nothing to do with the reasonableness of the transaction."

Notwithstanding this decision of Lord Langdale, some judges still held tenaciously to a hard and fast rule as to the necessity of a limit of space for the validity of the contract. While others as firmly contended, that in every such case, the crucial test was, whether the restraint imposed was larger than was reasonably required for the protection of the covenantee or contractee. In other words, that the validity or invalidity of the contract turned upon the reasonableness of the restraint and its sufficiency to protect the rights of the contractee.

Leather Cloth Co. v. Lorsaont (1869) 9 Equity, p. 345, is the leading authority on restraint as to a limit of space in the case of a sale of a trade secret. The facts briefly summarized were as follows: Defendant sold to plaintiffs certain patent rights and secret processes for the manufacture of leather cloth, and in consideration of said purchase covenanted that he would not carry on in any part of Europe any manufactory having for its object the sale of products which were the subjects of such patent rights, and would

not communicate the processes of such manufacture. The defendant having violated his agreement a bill was filed against him for an injunction. Notwithstanding there was no limit, either of time or space, (the limit of Europe being equivalent to an unlimited covenant) it was held the restriction imposed was not greater than was necessary for the protection of the covenantees, and the contract was therefore valid.

Ten years later this decision was followed and approved by Mr. Justice Fry, in his able judgment, in the celebrated case of *Rousillon v. Rousillon* (1880) 14 Ch. D. p. 351. Lindley, L.J., thus refers to this judgment, in *The Maxim Nordenfelt case*. "In *Rousillon v. Rousillon*, Lord Justice Fry, in one of those admirable judgments for which he was so justly celebrated, came to the conclusion that the only test by which to determine the validity or invalidity of a covenant in restraint of trade given for valuable consideration was its reasonableness for the protection of the trade or business of the covenantee. This accords with the view of Lord Justice James in *Leather Cloth Co. v. Lonsont*, and is, in my opinion, the doctrine to which the modern authorities have been gradually approximating." The following extract from the judgment of Mr. Justice Fry, in the case referred to, will indicate its scope and purport:—"But then it is said that, over and above the rule that the contract shall be reasonable, there exists another rule, viz., that the contract shall be limited as to space, and that this contract being in its terms unlimited as to space, and therefore extending to the whole of England and Wales, must be void. Now, in the first place, let me consider whether such a rule would be reasonable. There are many trades which are carried on all over the kingdom, which by their very nature are extensive and widely diffused. There are others which from their nature and necessities are local. If this rule existed it would afford a complete protection to the latter class of trade, whilst it would prohibit complete protection of the former class, and an injury which ought not to be wrought without good reason would arise. In the next place, the rule if it existed would apply in two classes of cases. It would apply where the want of a limitation of space was unreasonable, and also where it was reasonable. Now in the former class of cases, those in which the universality was unreasonable, the rule would operate nothing, because the ground is already covered by the rule that the restraint must be reasonable. It would, therefore, only operate in cases in which the

universality of the prohibition was reasonable, that is, it would only operate where it ought not. For the existence of such a rule I should require clear authority."

The judgment of Fry, L.J., was subjected to criticism by L. J. Cotton in *Davies v. Davies* (1887) L.R. 37 C.D. p. 359. At page 386 he thus refers to it:—"I refer to the case which was decided by Lord Justice Fry. I think undoubtedly he used expressions which shewed that he took a somewhat wider view than I do of the law—a lower view perhaps I may say without disrespect. In that case of *Rousillon v. Rousillon* there was the limit of time which might have made the covenant a limited one and not a general covenant in absolute restraint of trade; and if so, it comes within what I think is now the true rule, that where there is a limited covenant you have to consider how far, having regard to the particular circumstances of the case, the limit is a reasonable one. About that case I say no more after what I have said on the cases generally."

Mr. Justice Chitty, in *Radische Anilin and Soda Fabrik v. Schott* (1892) 3 C.D. p. 447, when granting an injunction restraining the defendants from entering into any business similar to that carried on by the plaintiff, and from starting any business of that kind themselves, said, he considered the decision in *Rousillon v. Rousillon* to be a binding one, and also that he thought that decision was right. On the next question of the reasonableness or unreasonableness of the restraint as to the limit of space, regarding which so many "jarring opinions" prevail, his lordship made the following pertinent remarks:—"The improvements in the means of communication which have taken place in recent times by reason of railways, steamships, postal facilities, the telegraph and the telephone, are, I think, within the scope of the enquiry, and bear particularly on the question of space; they are almost more or less in proportion to the greater or lesser area within which the trade sought to be protected is carried on and to the varying nature of the trade itself. . . . What might in former ages have been considered an unreasonable restriction would not necessarily be so held in the altered circumstances of the present time."

From the great leading case of *Mitchell v. Reynolds* down to 1894 there had been jarring and divided opinions among the judges; some holding with Bowen, Lord Justice, to a hard and fast rule, that if the covenant or agreement of restraint were unlimited as to

space, it was, apart from its reasonableness, invalid ; others holding with Lord Justice Fry, that the only test by which to determine the validity or invalidity of the covenant or agreement in restraint of trade, given for valuable consideration, was its reasonableness for the protection of the trade or business of the covenantor or contractor. Finally the question was set at rest by the decision of the House of Lords, on appeal, in the case of *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Company* (1894) L.R.; A.C. p. 535. This case affirmed the decision of the Court of Appeal (1893) 1 Ch. p. 630, that the covenant, though unrestricted as to space, was not wider than necessary for the protection of the company, and that it was therefore valid and might be enforced by injunction.

Lord Watson, in the course of his able judgment, said :—"When the series of cases, from the earliest to the present time, are carefully considered, I think they will be found to record the history of a protracted struggle between the principle of common honesty in private transactions, on the one hand, and the stern rule which forbade all restraints of trade on the other. In my opinion it does not admit of dispute that the ancient rule has had the worst of the encounter, and has been gradually losing ground in all the courts. I do not think that, between the courts of common law and equity, there has been much, if any real difference of opinion. But I am bound to say that the language used by equity judges is on the whole more in consonance with the commercial policy of the country than some of the favourite dicta of the common law courts. I purposely say some of the dicta, because I find in the opinions of many common law judges of the highest eminence a clear and liberal recognition of the wider views of policy, which have influenced your lordships in the decision of this appeal."

Lord Morris thus succinctly epitomizes the findings of the Court of Appeal in this important case :—"My lords, I entirely concur in the judgment and the reason for it given by the Lord Chancellor. But I desire to express my opinion that, without going through the numerous cases which have been so exhaustively dealt with in the Court of Appeal and by your lordships, the weight of authority up to the present time is with the proposition that general restraints of trade were necessarily void. It appears, however, to me that the time for a new departure has arisen and that it should be now authoritatively decided that there should be no difference in the legal considerations which would invalidate an agreement whether

in general or partial restraint of trading. These considerations, I consider, are whether the restraint is reasonable and is not against the public interest. In olden times all restraints of trading were considered *prima facie* void. An exception was introduced when the agreement to restrain from trading was only from trading in a particular place and upon reasonable consideration, leaving still invalid agreements to restrain trading at all. Such a general restraint was in the then state of things considered to be of no benefit even to the covenantee himself; but we have now reached a period when it may be said that science and invention have almost annihilated both time and space. Consequently there should no longer exist any cast-iron rule making void any agreement not to carry on a trade anywhere. The generality of time and space must always be a most important factor in the consideration of reasonableness though not *per se* a decisive test."

It would seem the crucial test, in each case, has been reduced to this, whether the restraint is greater than necessary for the reasonable protection of the contractee. The reasonableness or unreasonableness of the contract and its sufficiency to protect the rights of the contractor is a question of law, and is decided by the court and not by the jury. See *Mallon v. May*, 11 M. & W. p. 652.

It is by tracing back to its source we are enabled to see how progressive has been the science of the law, and by what slow, yet constant progress, it has evolved the admirable system it now presents, and justifies the truth of the maxim—that what is not reason is not law. Such a research also exemplifies the force of the aphorism—*Melius est petere fontes quam sectari rivulos*.

SILAS ALWARD.

St. John, N.B.

ENGLISH CASES.

*EDITORIAL REVIEW OF CURRENT ENGLISH
DECISIONS.*

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**APPROPRIATION OF PAYMENTS—BANKING ACCOUNT—FOLLOWING FUND—
RULE IN CLAYTON'S CASE—CLIENT'S SECURITIES DEPOSITED TO SECURE
BROKER'S INDEBTEDNESS.**

In *Mutton v. Peat* (1900) 2 Ch. 79, the Court of Appeal (Lindley, M.R., and Rigby and Collins, L.JJ.) have reversed the decision of Byrne, J., (1899) 2 Ch. 556 (noted ante p. 51), but they do so because they arrived at a different conclusion as to the facts. The facts as found by the Court of Appeal were that the stock brokers had two accounts with their bankers, a current and a loan account. They failed, and at the time of their failure there was a balance of £1362 10s. to their credit on the current account, and a debit of £7500 on the loan account. The brokers had deposited with the bankers, as security for their general indebtedness, bonds and securities of their clients, without their knowledge or consent, but the bankers received them believing them to be the property of the brokers and without notice of the true owners' rights. Byrne, J., held that the deposit was made merely as security for the loan account, but the Court of Appeal found that it was made to secure the general indebtedness. Two days before the failure, one Parker, who was a client of the brokers, had sent them £790 4s. 6d. for investment, which was paid into the brokers' current account and formed part of the £1362 10s. standing to their credit on that account. The securities realized sufficient to pay off the £7500 and left a balance over, out of which Parker claimed to be paid the £790 4s. 6d. Byrne, J., held, that, owing to the way the accounts had been kept by the bankers, there had been no appropriation of the £1362 10s., to the payment of the balance due on the loan account and there was consequently a balance due to the credit of the current account applicable to recouping Parker the sum of £790 4s. 6d., but the Court of Appeal differed from this, and held that the two accounts must be treated as one account, and that it was the duty of the bank to apply the £1362 10s.

in reduction of the loan account, and that the balance of the proceeds of the securities which remained in their hands belonged to the owners of the deposited securities, and that Parker had no equity as against them to be repaid the amount of his cheque out of the £1362 10s.

**MARRIAGE SETTLEMENT—AGREEMENT FOR SETTLEMENT BY INFANT—REPU-
DIATION—RATIFICATION—MARRIAGE WITH FOREIGNER—CHANGE OF DOMICIL
BY MARRIAGE.**

Viditz v. O'Hagan (1900) 2 Ch. 87, is also a decision of the Court of Appeal (Lindley, M.R., and Rigby and Collins, L.JJ.) reversing the judgment of Cozens-Hardy, J., (1899) 2 Ch. 569 (noted ante p. 52). It will be seen by reference to that note that the judgment of the Court below proceeded on the ground that according to English law the settlement in question, although made by an infant, was voidable only on her repudiating it within a reasonable time after attaining her majority. The Court of Appeal, however, have come to the conclusion that the settlor having acquired an Austrian domicile by her marriage, the settlement was governed by Austrian law, under which a husband and wife have the right to revoke their marriage settlement notwithstanding the birth of issue and acts of ratification, and that therefore the wife never could ratify the settlement so as to deprive herself of the right of revoking it. The Court of Appeal therefore held that the wife was not bound by the marriage articles, or the settlement made in pursuance thereof, having validly revoked the same under Austrian law by a notarial act.

**TENANT FOR LIFE—REMAINDERMAN—TRUST FOR CONVERSION—DISCRETION TO
POSTPONE CONVERSION—OMISSION TO CONVERT—INCOME.**

Rowlls v. Bebb (1900) 2 Ch. 107, was a contest between a tenant for life and a remainderman. Property was given by will in trust for conversion and investment and to hold the investments on trust for a tenant for life and remainderman, with a discretionary power to the trustees to postpone the conversion, and a provision that until conversion the income was to go to the tenant for life. The trustees, as a matter of fact, postponed the conversion of a certain reversionary interest, but not, as the Court of Appeal found, in the exercise of the discretion. This reversionary interest having fallen into possession and, having been realized, in

adjusting the rights of the tenant for life and remainderman in the proceeds, the Court of Appeal (Lindley, M.R., and Rigby and Collins, L.JJ.) held that the fund must be apportioned between the tenant for life and remainderman on the principle laid down in *re Chesterfield* (1883) 24 Ch. D. 643.

UNDUE INFLUENCE—HUSBAND AND WIFE—SOLICITOR AND CLIENT—INDEPENDENT ADVICE.

In *Barron v. Willis* (1900) 2 Ch. 121, the Court of Appeal (Lindley, M.R., and Rigby and Collins, L.JJ.) have reversed the decision of Cozens-Hardy, J. (1899), 2 Ch. 578 (noted ante p. 54). That learned Judge held that the relation of husband and wife is not one to which the doctrine of *Huguenin v. Basely*, 14 Ves. 273, applies, and he upheld a deed made by a married woman to her prejudice, varying a settlement, without any independent advice, and acting only on the advice of the husband's solicitor. The Court of Appeal, without discussing that point, held that there was a confidential relationship between the wife and the husband's solicitor, and that, notwithstanding that he fairly explained the effect of the deed to her, and recommended her to obtain the advice of an independent solicitor, she was, nevertheless, entitled to have it set aside as obtained by undue influence, on the ground that it had not been explained to her that she was under no obligation to execute it, and that it was adverse to her interests, and that she ought not to execute it without independent advice; and the Court of Appeal further held that it was the duty of the solicitor not only to explain the deed to the wife, but to take care that she did not execute it without having independent advice as to her position and rights.

LIGHT—OBSTRUCTION—INJUNCTION—REBUILDING—USER—INTERRUPTION—ABANDONMENT.

Smith v. Baxter (1900) 2 Ch. 138, deals with a question as to ancient lights, and is deserving of notice notwithstanding that such rights can no longer be acquired, inasmuch as rights already acquired are not affected by R.S.O. c. 133, s. 36. The plaintiffs in the action claimed to have acquired the rights in question under a lease for 21 years, dated Sept. 29, 1892. On the site of the demised premises formerly stood five small houses which were in existence more than 20 years before the commencement of the

action. They were pulled down in 1891 and new buildings erected, and the plaintiffs claimed the light in question in respect of windows in the new buildings, which corresponded to windows in the old ones. None of the lights had been preserved in entirety in the same place in the new buildings but substantial portions of all the new windows coincided with the windows of the old building. It, however, appeared that as to two windows in the new building the plaintiffs had boarded them up for more than twelve months before action, and as to a third, shelving had been placed before it, but that, notwithstanding the shelving, a substantial quantity of useful light passed into the building. It was contended by the defendants that the erection of the boarding and shelving against these windows constituted an "interruption," but Sterling, J., who tried the action, negatived that contention, and held that an "interruption" of enjoyment of an easement of light to be within the Act must be an adverse obstruction and not a mere discontinuance of user: but he held that the question of whether the alleged right had been enjoyed for a period of twenty years was one of fact to be determined on the circumstances of each case; and he held that, although non user would not be sufficient to establish an abandonment of a right actually acquired, it might nevertheless be sufficient to prevent the acquisition of the right, and, as to the windows boarded over, he held that there had not been an enjoyment for a sufficient period to give the plaintiff a prescriptive right to the light to those windows, although admitting that the use of shutters or other temporary obstructions would not have that effect. He, however, held that the erection of the shelving did not entirely exclude the light and as to that window the plaintiff had made out his case.

COMPANY—DEBENTURE—ASSIGNEE OF DEBENTURE TRANSFER—CROSS CLAIM BY COMPANY AGAINST TRANSFEROR—REGISTRATION OF TRANSFER.

In re Goy, Farmer v. Goy (1907) 149, is a decision of Stirling, J. The facts were that after a joint stock company had entered upon a voluntary winding up, and a liquidator had been appointed, and a judgment given in a debenture holders' action against the company, one, Robey, became transferee of certain debentures by way of security for a loan to one Chandler who had been a director of the company, and the conditions of the debentures provided that transfers of debentures would be registered on

production and proof of identity and payment of a fee, and that the principal and interest of the debentures would then be paid to the transferee without regard to any equities between the company and the original or any intermediate holder. After Robey had taken his transfer it was discovered that Chandler had been guilty of misfeasance, and he was ordered to pay the liquidator a sum of money in respect thereof. Robey, who had no notice of any cross claim by the company against Chandler, sent in his transfer for registration, but the liquidator declined to register it and claimed to deduct Chandler's debt to the company from the amount due on the debenture. Stirling, J., held that he had no such right, and that Robey was entitled to be registered as transferee and that such right was not affected by the winding up, or by the judgment, and that consequently Robey must be paid, without deduction, any dividend payable in respect of the debentures so transferred to him.

LANDLORD AND TENANT—LEASE—FORFEITURE—NOTICE OF BREACH—COVENANT TO BUILD—COVENANT TO REPAIR—CONTINUING BREACH—CONVEYANCING AND LAW OF PROPERTY ACT, 1881, (44 & 45 VICT. C. 41) S. 14—(R.S.O. C. 170 S. 13).

In *Jacob v. Down* (1900) 2 Ch. 156, the plaintiff sought to recover possession of certain demised premises on the ground of forfeiture for breach of covenant to build. The lease contained a covenant to build within twelve months, and also to keep in repair the buildings so to be erected. After the expiry of the twelve months the plaintiff accepted a quarter's rent, and subsequently gave notice of forfeiture by reason of the breach of covenant to build, but the notice made no reference to the covenant to repair. Stirling, J., tried the action and held that the covenant to build was broken once for all at the expiration of the twelve months, and was not a continuing covenant, and that the subsequent acceptance of rent was a waiver of the breach; that the covenant to repair was a continuing covenant, and implied an obligation to erect the buildings, and there was a continuing breach of it, but inasmuch as the notice under the Conveyancing Act, (see R.S.O. c. 170, s. 14) omitted to refer to any breach of the covenant to repair, the notice was insufficient and the action could not be maintained. How a covenant to repair can be broken when there is nothing in existence to repair, is hard to understand.

TRUSTEE—RETAINER OF TRUST PROPERTY TILL ARREARS DUE BY SETTLOR PAID
—ASSIGNEE OF SETTLOR—COVENANT BY SETTLOR.

In re Weston, Davies v. Tagart (1900) 2 Ch. 164, is a case in which the rights of trustees under a deed of separation were in question. By the deed certain leaseholds were vested in the trustees in trust to pay the rents to the wife for life, and then to sell and hold the proceeds for the husband. The husband covenanted with the trustees to make up the wife's income to £300 a year. The deed contained a proviso for its determination in the event of the wife seeking to resume cohabitation, but it contained no covenant on her part to live separate. The husband paid nothing under the covenant and in 1898 was adjudicated bankrupt, and the trustees proved against his estate for the arrears then due, but there were further arrears since that date. On the wife's death the husband's assignee in bankruptcy claimed the leaseholds. The trustees contended that they were entitled to retain them until the arrears due under the husband's covenant were paid, and Stirling, J., upheld the contention and gave judgment in their favour.

WILL—"TESTAMENTARY EXPENSES," WHAT INCLUDED IN.

In re Clemow, Yeo v. Clemow (1900) 2 Ch. 182. The short point here determined by Kekewich, J., is the meaning of a direction contained in a will to pay "the testamentary expenses" of some third person. He held that it extended to (1) the costs and expenses of obtaining the letters of administration to, and administering the estate of such third person; (2) the costs of one of the next of kin who had brought an action in the Probate Division contesting an alleged will in which the Court, though pronouncing against the alleged will, made no order as to costs; and, (3) the estate duty payable in respect of the personal property of such third person.

WILL—CONSTRUCTION—SPECIFIC DEVISE—RESIDUARY GIFT—GIFT OF "ALL OTHER MY FREEHOLD MESSUAGES AND TENEMENTS"—LAPSED DEVISE—WILLS ACT (1 VICT. C. 26) S. 25 (R.S.O. C. 128, S. 27).

In Re Mason, Ogden v. Mason (1900) 2 Ch. 196, a question was raised which depended on the construction of a will, whereby the testator devised his freehold shop at Wimbledon to his son, and then devised to the plaintiffs "all other my freehold messuages

and tenements at Wimbledon and elsewhere." The devise to the son having failed by reason of his being a witness to the will, the plaintiffs claimed that the freehold shop passed to them under the gift to them. Kekewich, J., was at first inclined to hold in favour of the plaintiffs, but on examination of the authorities he came to the conclusion that, according to *Springett v. Jennings* (1871) L.R. 6 Ch. 333, the devise to the plaintiffs could not be construed as a residuary devise under the Wills Act (1 Vict. c. 26) s. 25, (R.S.O. c. 128, s. 27), so as to entitle the plaintiffs to the property, which was the subject of the lapsed devise to the son, on the ground that the word "freehold," even though in fact there were no copyholds belonging to the testator, restricted the devise and prevented it being a universal residuary devise, and he therefore held that the heir was entitled.

VENDOR AND PURCHASER—UNWILLING PURCHASER—QUALIFIED COVENANT AGAINST ASSIGNMENT—LESSOR'S CONSENT—UNREASONABLE REFUSAL OF CONSENT TO ASSIGN.

In re Marshall & Salt (1900) 2 Ch. 203, was an application, by purchasers, under the Vendors' and Purchasers' Act, asking for a declaration that a marketable title to the property contracted to be sold had not been made out. The property sold was a leasehold public house; the lease contained a covenant against assigning without the consent of the lessor, but such consent was not to be unreasonably withheld in the case of a respectable and responsible tenant. The lease contained a clause empowering the lessor to re-enter in default of the observance and performance of any of the covenants in the lease. The purchasers were brewers and the lessor refused to consent to an assignment on the ground that he wished the house to remain a free house. The vendor contended that the refusal of the lessor to consent was unreasonable and that, in consequence, the assignment could be validly made without his consent. He refused, however, to indemnify the purchasers. Under these circumstances Byrne, J., held that the purchasers could not be required to accept the title and he ordered the deposit to be returned with interest, and the vendor to pay the purchasers' costs of investigating the title.

MORTGAGEE—POWER OF SALE—INJUNCTION—CO-DEFENDANTS—INDEMNITY.

In Born v. Turner (1900) 2 Ch. 211, the plaintiff claimed an injunction to restrain interference with his light. The plaintiff

was a purchaser from a mortgagee at a sale under a power of sale contained in the mortgage, of part of the mortgaged property, and the question was whether a mortgagee could, in the exercise of his power, give to the purchaser an implied easement of light over the unsold portion, and Byrne, J., held that he could. The action was against an adjoining owner and his builder, and the builder severed in his defence from his employer and appeared separately at the trial, when an injunction was granted with costs against the adjoining owner, and Byrne, J., held that the builder was entitled to complete indemnity from his co-defendant, and to an order for the payment of his solicitor and client costs by his co-defendant. Although R.S.O. c. 133, s. 36 abolishes the right to acquire in Ontario a right to the use of light by prescription, it probably will be found not to interfere with its acquisition by implied grant as in this case.

PARTNERSHIP—GOODWILL—SALE OF BUSINESS—SOLICITING CUSTOMERS.

In *Gillingham v. Beddow* (1900) 2 Ch. 242, the plaintiff and defendant had formerly been in partnership. Under the articles the plaintiff had bought out the defendant; the articles provided that the outgoing partner might set up a similar business in the neighbourhood. The defendant had not only set up a similar business, but had also solicited the customers of the former partnership to deal with him, and it was to restrain this solicitation that the action was brought. Cozens-Hardy, J., granted the injunction asked, holding the case to be governed by *Trego v. Hunt* (1896) A.C. 7 (noted ante vol. 32, p. 315).

PATENT—INFRINGEMENT—INJUNCTION—DAMAGES—ALTERNATIVE RELIEF.

Saccharin Corporation v. Quincey (1900) 2 Ch. 246, was an action to restrain the infringement of three patents for inventions, and, in the alternative, for damages. The article in question was exclusively manufactured abroad, and the only evidence of infringement adduced was that of an expert who testified that the plaintiff's patents related to three separate and distinct modes of producing the article in question, and that it was not possible to tell, from an examination of any parcel, under which particular patent process it was produced, but that it must have been produced under one or other of the three covered by the plaintiff's patents. Cozens-Hardy, J., held that this evidence was insufficient

to found an injunction, inasmuch as it failed to establish which patent had been infringed, but he held that as the plaintiff's patents covered every possible mode of producing the article in question, they are entitled to the alternative relief of damages, as the nature and extent of the wrong done to the plaintiffs did not depend upon the particular patent infringed; and an inquiry was directed, without mentioning either of the patents, to ascertain what damages the plaintiffs had sustained by the defendant's use of the patented article.

COSTS—TRANSLATIONS OF FOREIGN DOCUMENTS.

In re Bowes, Strathmore v. Vane (1900) 2 Ch. 251, Cozens-Hardy, J., here held that a solicitor was entitled to be allowed, in an administration proceeding, for the costs of translations of foreign documents, required in the course of the litigation, made by a clerk in his office, by himself, and by a lady under his supervision, although no payment had been made by the solicitor for the same—overruling the taxing officer to whom the matter was referred back to fix the quantum.

CONFLICT OF LAWS—FOREIGN MARRIAGE OF FRENCHMAN AND ENGLISHWOMAN
—VALIDITY OF MARRIAGE—CONSULAR MARRIAGE ACT, 1849 (12 & 13 VICT. C. 68)—FOREIGN MARRIAGE ACT, 1892 (55 & 56 VICT. C. 23).

In *Hay v. Northcote* (1900) 2 Ch. 262, the validity of a foreign marriage between a Frenchman and Englishwoman was in question. The marriage had been performed before the British Consul at Bordeaux and was in accordance with the Consular Marriage Act, 1849, which is re-enacted by the Foreign Marriage Act, 1892. A French tribunal had, in the lifetime of both parties, declared the marriage a nullity, and the parties had therefore lived apart. The husband having died, the representatives of the wife's father, who had made a post-nuptial settlement on his daughter, claimed to have it declared that the settlement was void by reason of the alleged nullity of the marriage; but Farwell, J., was of opinion that notwithstanding the decision of the French Court the marriage was valid and binding on the parties under English law.

PRINCIPAL AND AGENT—INSTRUCTIONS TO SELL REALTY—AUTHORITY TO SIGN CONTRACT—SPECIFIC PERFORMANCE—VENDOR AND PURCHASER.

In *Rosenbaum v. Belson* (1900) 2 Ch. 267, Buckley, J., determined that where one gives another written authority to sell real

estate and agrees to pay a commission on the sale, there is an implied authority also given the agent to sign the contract of sale on behalf of the vendor.

COMPANY—DIRECTORS—QUORUM—ARTICLES OF ASSOCIATION.

In re Bank of Syria (1900) 2 Ch. 272, was a winding-up proceeding in which the validity of a security given by the directors of the company was in question. By the articles of association it was provided, inter alia, that the number of the members of the council of administration (which was invested with power to conduct the affairs of the company) should not be less than three, also, that the continuing council might act notwithstanding any vacancy, and also, that the council might determine the quorum necessary for the transaction of business. The members of the council became reduced to two. It was alleged, but not proved, that the quorum had been fixed at three. The transaction whereby the security in question was given was entered into by two of the directors only. Wright, J., held that even if the quorum had been fixed at three, yet under the article empowering the continuing council to act notwithstanding any vacancy, the transaction was binding on the company, the transferee having no notice of any irregularity.

Mr. Edward Dicey in an interesting article contributed to the *Fortnightly Review* on the late Lord Russell, refers to an incident which may be repeated for the comfort of any of the younger members of the profession, who may be placed in similar circumstances. He says, the Chief once told him that the keenest disappointment of his life was his failure to obtain a post in the gift of the Liverpool municipality, to which he felt he had a strong claim on his own merits. He added, however, what he thought a calamity at the time was really the greatest stroke of luck which had ever happened to him. "If," he said, "I had been elected, I should have lived and died an obscure stipendiary official in a provincial city; as it is——" and here he left the sentence unfinished. Others besides the eminent Chief Justice have been thankful that they have been disappointed in obtaining some position which would not have given them an opportunity to shew the stuff that was in them.

Correspondence.

MUNICIPAL LAW AMENDMENT.

To the Editor of the CANADA LAW JOURNAL.

SIR,—Is it not time that some united action were taken by the profession to have an amendment made to sub.-s. 3 of s. 606 of the Municipal Act regarding the giving of notice of accident? In my humble opinion it is a most iniquitous provision and very often bears very hardly in deserving cases.

When a person is badly injured through the want of repair of a public street or road it is generally several weeks and sometimes months before he is out of the doctor's care. He is ignorant of the seven or thirty days' notice, as the case may be, and does not think of consulting a lawyer until he is able to be about again. The consequence is that though the accident happened through no fault of his own but owing entirely to the gross negligence of the corporation he has no redress. Would it not be infinitely more fair to have a provision such as that in the Workman's Compensation for Injuries Act, viz.: that the notice of injury must be given within twelve weeks, and the action commenced within six months from the occurrence of the accident or in case of death within twelve months from the time of death, and that in case of death the want of such notice shall be no bar if the judge shall be of the opinion that there was reasonable excuse for such want of notice. In my limited experience a number of cases have come to my notice where no compensation for severe injuries could be obtained simply because no notice as required by the Act had been given.

I believe that the solicitor for a municipal corporation not more than 100 miles from Hamilton was instrumental in getting the Act limiting the time for giving the notice of accident as it now stands through the Legislature, and it might be interesting to hear his views from the corporation standpoint.

Could not the County Law Association co-operate in having an amendment of this unjust provision made? I would like to hear from other readers of your journal.

Yours truly,

Hamilton, October 25.

JOHN G. FARMER.

[We concur. See remarks on p. 609 ante.—ED. C.L.J.]

LAW REFORM.

To the Editor of the CANADA LAW JOURNAL.

SIR,—I find in your issue of the 1st inst., an article commenting on some remarks made by me in reference to our system of administering law. I have taken no notice of abusive letters from one or two lawyers, but when your journal, the organ of the profession, has taken up the matter, I ask permission in your columns to correct some errors into which you have fallen, and to place my views clearly, so that there may be no misunderstanding. I will deal first with the errors.

You say that I accused the solicitor of misappropriating money ; that I made wholesale charges of wrong-doing against the profession as a class, and that I charged it with being a degraded thing. In reply I say that I did not make charges against the profession, but against the system of the administration of civil justice. This system has been in use, with constant attempts to amend it, for hundreds of years, so that the present members of the profession only follow the practice and traditions of centuries. I hold that the system is wrong, and that it should be reformed. Slavery was a wrong handed down for many generations, yet a man might have denounced the institution, without being charged with reflecting upon the character of the slave owners, who were born under it. Slavery has been reformed out of existence in all civilized countries, and when the public fully appreciate the wrong of the present method of administering law, a change may be made to remedy it, and this could be done without injustice to the present members of the profession. That I attacked the profession instead of the system is your first error.

The next is your statement that the costs in the Police Court are enormously greater in proportion than in any civil court. This statement cannot be true. There are practically no costs in the Police Court except when put on as a punishment. When a fine of one dollar and costs is inflicted it is done to make the punishment, the payment of the four dollars. I could just as well make the fine four dollars without costs, for when the circumstances require a less severe punishment the fine is usually two dollars without costs. In wages cases there are practically no costs unless I impose them simply as a punishment. The majority are settled without any costs, and poor employees are never asked to deposit

one cent to have their cases tried. I am positive that there is no court in Canada where the citizens can have their difficulties settled at less expense than in the Toronto Police Court.

You intimate that I am highly paid, and do less work than any other judge, and that my assistant does half the work. These are also errors. I did not ask for the position of Police Magistrate. An offer was cabled to me to England. I accepted it at the request of Sir Oliver Mowat. My salary was to be \$4,000 a year. That was twenty-three years ago. The work has increased enormously since then, but my salary is still \$4,000. My assistant sits three afternoons a week to try the by-law cases. I try more cases than any judge in Canada. I have to hold court to try indictable and other serious offences every day except Sundays and public holidays. The judges, who do not sit every day, get two months' holidays every summer, and ten or fifteen days at Christmas. I never get a day without having to pay an assistant to do my work, whether I am well or ill. I know of no official in Canada who, in this respect is treated as I am, who has no holidays, and who can never be absent one day, even through illness, without paying out of his own pocket for some one to do his work. About 1,400 indictable cases come before me each year. About ninety-five per cent. elect to be tried by me; each case that goes to the higher court costs the country from \$50 to \$100.

Having now corrected these errors, I will state my views in reference to the administration of civil justice. The State has taken upon itself the duty of settling disputes between citizens. This is an absolute necessity unless we relapse into barbarism, where no man would have any rights unless he was able to defend them by force. The State having taken upon itself this duty, and having the power of organized government to enforce anything it undertakes, it follows that the individual citizen is at the mercy of the system which the State devises, and is helpless in its hands. I hold therefore that when a man is a peaceable citizen, obeying the laws, paying his taxes, and conforming to the rules of organized society, that he is entitled if he gets into any difficulty or dispute with a neighbour, which they cannot settle between themselves, to be able to appeal to the State to see that justice is done, and I feel that this duty should be performed at the least possible expense to the individual.

Now what is the usual course under the present system? Two

neighbours in a business transaction have a dispute or a misunderstanding. It often happens that there is a good deal to be said on both sides. The differences, however, are irreconcilable, and the citizens have to appeal to the State to decide. One citizen goes to his lawyer, lays the whole case before him naturally with his own colouring, and gets an opinion on the law. The counsel knows well that no one can positively tell what is the law, but probably gives an opinion that his client has a good case, and one that is worth fighting in the courts. A letter is written to the other side or a writ is served, and the defendant goes to his lawyer for advice. The lawyer hears the defendant's statement, looks up precedents, and advises him to defend the case, although he also knows that there is no certainty as to the law. The case is now fairly started and the costs begin to roll up. Motions of all kinds can be made—to set aside appearance, for security for costs, for particulars of statement of claim, or defence, to strike out statement of claim or defence, for better and further affidavit on production, to compel attendance of witnesses, and so on; then the examination for discovery, and other examinations, conducted at great length, and with tiresome reiteration and repetition all taken down in shorthand, all extended in full, all rolling up heavy expense. Then after all these motions and filings of affidavits, and examinations upon them, and attendance, and drafts and engrossings, etc., the case at last comes before a jury. Technicalities of law are brought up, and discussed and overruled and reserved. Then witnesses are examined again with the same reiteration and repetition all again taken down in shorthand. Objections are raised to questions. These are also argued, and the objection sustained or overruled, with points again reserved. These things all tending to confuse the minds of the jury as to the real merits of the case, which are often to be found on both sides. Then follow long arguments of counsel, then the judge's charge, then the objections to the judge's charge, the reserving of more points, with the result that the jury will probably give the verdict one way, while the judge has reserved law points to settle whether the decision should not be the other.

The case may then come up before the full court, and the points of law concerning which (if the law is the great science our profession claim it to be) there should be no question, have to be decided. Three judges, supposed to be experts, impartial, upright men, who have devoted their lives to the study of the law, sit for hours and

listen to the same arguments on the same evidence, with the same precedents quoted, under the same magnetic influence and ability of the counsel on both sides, without the slightest reason apparent why they should differ, if there is anything in our boasted science of law, and at the end of it all two of the judges will decide one way and one the other.

Then an appeal is taken to the Court of Appeal, and the same thing happens, only the judges of this court are supposed to be still more highly trained experts, and here also two may decide one way and three the other on exactly the same facts and arguments. Then follows an appeal to the Supreme Court, where the same old story is told with the result possibly that three will decide one way, and two the other. Lastly comes the Judicial Committee of the Privy Council, and then a final decision is made one way or the other, but apt to be the nearest right, because they have no appeal above them, and do not trouble themselves nearly so much about precedents as about justice.

Then what happens? One man wins and the other loses, neither being altogether in the right, neither altogether in the wrong, but one gets everything, the other loses everything, his own costs and his opponent's taxable costs, while the successful man is heavily punished in his solicitor and client costs, and in the mental worry, loss of time etc. The total costs in a case like this would probably amount to thousands of dollars, if not tens of thousands, and might have been as satisfactorily settled without expense, and with just as much certainty if the parties had tossed a copper to decide it at the start. It must be remembered that a man once in the law cannot avoid this. If a poor man is fighting a rich man or a rich corporation, he must absolutely give up his right to have the case decided or run the risk of ruin.

It was against this system that I based my remarks, and expressed my hope that some day the people through their Parliament would be able to reform it. I think that the State should legislate so that the judges should decide disputes quickly and simply, without formalities, and without regard to anything except the absolute justice in each case, that there should be only one appeal which should be final, that musty precedents, perhaps the mistakes of men gone by, should not be worshipped or followed to create injustice. If the State did this, did away with all fees of every kind, and hired the lawyers at fixed salaries to assist the judges in bringing forward

evidence, there is no occasion why disputes could not be settled in one tenth of the time and at one twentieth the expense now incurred.

Yours etc.,

Toronto.

GEORGE T. DENISON.

[As our readers are lawyers as well as ourselves, we do not propose further to discuss the matter except in the few remarks made on a previous page, ante p. 610.]

REPORTS AND NOTES OF CASES.

Dominion of Canada.

EXCHEQUER COURT.

ADMIRALTY DISTRICT OF PRINCE EDWARD ISLAND.

Sullivan, Local Judge.]

[May 18.

BRINE V. STEAMSHIP "TIBER."

Collision—Steamer and sailing vessel—Arts. 20, 22, 23 and 25.

The J. M., a sailing vessel, was proceeding in the day time, out of Charlottetown harbour by tacking, according to the usual course of navigation. The T., a steamship, was on her way into the harbour. When the T. was first seen by the J. M. the latter was on a course of W. S. W., standing across the harbour, towards, and to the northward and eastward of Rocky Point black buoy. From that time until a collision occurred between the two vessels, they were in full view of each other. While the J. M. was under way on the starboard tack and going about three knots an hour, the T. was coming straight up the harbour at nearly full speed. The latter did not change her course, nor execute any manœuvre nor make any attempt by slackening speed or stopping or reversing to keep out of the way of the J. M. The bow of the T. struck the J. M. on the starboard side aft of the forerigging and nearly amidships, cutting her almost through from her hatches to her keel, and causing her to become a total wreck.

Held, that the T. had infringed the provisions of Arts. 20, 22, 23 and 25 of the rules for preventing collisions at sea and was responsible for the collision.

A. Peters, Q.C., and *McLean*, Q.C., for plaintiff. *Hazard*, Q.C., and *Morson*, Q.C., for defendant.

Burbidge, J.]

BRIGHAM v. THE QUEEN.

[June 7.

Grant of ferry — Breach of — Subsequent lease to railway companies — Damages — Liability of crown.

The Crown having granted to the suppliant certain ferry rights over the Ottawa River between the cities of Ottawa and Hull, subsequently leased certain property to two railway companies to be used for the construction of a bridge across the said river between the said cities and also gave permission or license to the Ottawa Electric Railway Company to extend its track over certain property belonging to the Dominion Government on the Hull side of the river to enable the latter to make closer connection with the Hull Electric Company. The suppliant claimed that such leases and license enabled the said companies to divert traffic from his ferry, and constituted a breach of his ferry grant for which the Crown was liable.

Held, that the granting of said leases and license did not constitute a breach of any contract arising out of the grant of the ferry; and that the Crown was not liable to the suppliant in damages in respect of the matters complained of in his petition. *Windsor and Annapolis Railway Co. v. The Queen*, 10 S.C.R. 335; 11 App. Cas. 607 and *Hopkins v. Great Northern Railway Co.*, 2 Q.B.D. 224, referred to.

Semble, that if the said leases and license prejudiced the rights-acquired by the suppliant under his ferry grant he would be entitled to a writ of scire facias to repeal them.

H. Aylen, Q.C., for suppliant. *Solicitor-General* and *E. L. Newcombe*, Q.C., for respondent.

Burbidge, J.]

THE QUEEN v. HARWOOD.

[June 11.

Expropriation of land for canal purposes — Damage to remaining lands — Access — Undertaking to give right of way — 52 Vict. c. 38, s. 3 — Effect of in estimating damages — Future damages — Agreement as to — Increased value by reason of public work.

Defendants owned a certain property situated in the counties of Vaudreuil and Soulanges, a portion of which was taken by the Crown for the purpose of the Soulanges Canal. Access to the remaining portion of the defendants' land was cut off by the canal, but the Crown, under the provisions of 52 Vict. c. 38, s. 3, filed an undertaking to build and maintain a suitable road or right of way across its property for the use of the defendants. The evidence shewed that the effect of this road would be to do away with all future damage arising from deprivation of access; and the Court assessed damages for past deprivation only.

2. It having been agreed between the parties in this case that the question of damages which might possibly arise in the future from any flooding of the defendants' lands should not be dealt with in the present

action, the Court took cognizance of such agreement in pronouncing judgment.

3. In respect to the lands taken the Court declined to assess compensation based upon the consideration that the lands were of more value to the Crown than they were to the defendants at the time of the taking. *Stebbing v. The Metropolitan Board of Works*, L.R. 6 Q.B. 37, and *Paint v. The Queen*, 2 Ex. C.R. 149; 18 S.C.R. 718, followed.

A. Globensky, for plaintiff. *C. A. Harwood*, for defendants.

Burbidge, J.] LAROSE v. THE QUEEN. [June 11.
Exchequer Court Act, s. 16 (c)—*Rifle range*—"Public work"—*Injury to person*.

The suppliant was wounded by a bullet fired, during target practice, from the rifle range at Cote St. Luc in the District of Montreal. He filed a petition of right claiming damages for the injury he thereby sustained.

Held, that the rifle range was not a "public work" within the meaning of clause (c) of s. 16 of The Exchequer Court Act (50-51 Vict. c. 16), and that the Crown was not liable. *City of Quebec v. The Queen*, 24 S.C.R. 448 referred to.

Charbonneau and Pettier, for suppliant. *E. L. Newcombe*, for respondent.

Province of Ontario.

COURT OF APPEAL.

From Robertson, J.] BOGARDUS v. WELLINGTON. [Sept. 22.
Statute of Limitations—*Sale of goods*—*Warranty*—*Fraud*.

The defendant, who was a nurseryman, sold to the plaintiff a number of peach trees, giving a warranty that they were "No. 1 peaches, warranted true to name":

Held, that this was a warranty that the trees were of the varieties contracted for, not that the fruit would be of those varieties; that the trees not being of the varieties contracted for the warranty was broken at the time of sale; and that in the absence of fraud an action for damages for its breach brought more than six years after the sale was barred, although until the trees came into bearing shortly before the action it was impossible to tell that they were not of the varieties contracted for.

Judgment of ROBERTSON, J., reversed.

Ritchie, Q.C., and *E. C. Ryckman*, for appellant. *Lynhc-Staunton, Q.C.*, and *J. H. Ingersoll*, for respondent.

From Armour, C.J.]

STROUD v. WILEY.

[Sept. 29.

Partnership—Purchase of partner's interest by co-partners—Errors in statements—Fraud.

In order to avoid a dissolution of partnership and a winding up of the business the interest of a partner in the partnerships' assets was purchased by his co-partners for an amount equal to the profits standing at his credit, his salary to the time of the purchase, and a percentage of his capital as shown in the last yearly balance sheet, which was based upon statements prepared under the supervision of this partner. More than two months after the transaction the plaintiffs brought this action alleging that part of the stock-in-trade had been over-valued in the statement and claiming repayment of part of the purchase money :—

Held, upon the evidence, that the purchase price was arrived at as a compromise, and not as an arbitrary proportion of definite items, but that apart from this as the statements had been prepared in good faith and in accordance with the uniform usage of the business the defendant was not liable.

Judgment of ARMOUR, C.J., reversed.

Aylesworth, Q.C., and *L. F. Stephens*, for appellant. *Robinson*, Q.C., for respondents.

From Divisional Court.]

[Sept. 29.

FERGUSON v. GALT PUBLIC SCHOOL BOARD.

Master and servant—Negligence—Common employment—Workmen's compensation for Injuries Act—Superintendence—Defects in ways.

The plaintiff was a laborer employed by the defendants to carry mortar to masons, also employed by them, who were building a wall on the defendants' land. The work was being done under the superintendence of a foreman who, after the wall had been built, directed the plaintiff and one mason to do the tuck-pointing next day. In order to enable the plaintiff to take the mortar to the mason at the foot of the outer face of the wall the mason and the plaintiff made a gangway, of planks which had been used in the scaffolding, from the top of the wall to the adjacent building and thence to the ground, and while the plaintiff was walking on the gangway with a load of mortar an insecurely fastened plank gave way and he was injured :—

Held, that the defendants were not liable at common law, the mason and the plaintiff being fellow-workmen exercising their own judgment as to the proper means of accomplishing their object, and the planks being strong and sufficient for the purpose required if properly fastened.

Held, also, that there was no liability under the Workmen's Compensation Act for Injuries Act, the mason not being a person to whose orders the plaintiff, in respect of the mode of carrying the mortar, was bound to conform, and the gangway not being a "way" within the meaning of the

Act, or constructed by a person having, in regard to it, superintendence entrusted to him.

Judgment of a Divisional Court reversed.

Lount, Q.C., and *W. D. Card*, for appellants.

A. Munro Grier, for respondent.

From *Boyd*, C.]

IN RE ALLEN AND NASMITH.

[Oct. 10.

Landlord and Tenant—Lease—Covenant—Renewal—Rent.

A lease of land, upon which there were no buildings except an old shed, contained a covenant by the lessor to grant at the expiration of the term if requested "another lease" to the lessee "for the further term of twenty-one years" at such rent as might be agreed on or fixed by arbitration, "such renewed lease to contain a like covenant for renewal":—

Held, that the rent for the renewal term should be based upon the value of the land at the time of the renewal, and not upon the value of the land and of buildings erected by the lessee during the term. *Van Brocklin v. Brantford* (1861), 20 U.C.R. 347; affirmed in appeal, 26th June, 1862 followed.

Judgment of *Boyd*, C., 31 O.R. 335, affirmed.

Aylesworth, Q.C., for appellant. *A. J. Russell-Snow*, for respondent.

HIGH COURT OF JUSTICE.

Boyd. C., *Ferguson*, J., *Meredith*, J.]

[Oct. 8.

HILL v. INGERSOLL AND PORT BURWELL GRAVEL ROAD CO.

Contract—Road company—Implied covenant—Corporate seal.

An agreement in writing signed by the plaintiff and by the superintendent of the defendants' road, but not under seal, and not purporting to be made by the defendants, who were an incorporated road company, was in part as follows,—*"I"*—the plaintiff—*"have this day agreed with"* the defendants *"to furnish good gravel and deliver the same in the centre of the road bed . . . and the company agree to pay me at the rate of \$2.40 per cord . . . And it is further agreed that my tolls . . . shall be free during the full term of this agreement. And it is further agreed that in consideration of this agreement and for the sum of \$1 . . . I do . . . discharge all claims I hold against the company . . . And it is further agreed that this agreement for gravel to hold good as long as the company keep the road and as long as my gravel holds good. . . ."*

Held, that an agreement on the part of the defendants that they would take from the plaintiff all the gravel they should require for the portion of their road referred to in the writing, as long as he was able and willing to

supply it, was not to be implied from the terms of the writing; and the taking of gravel from another person was not a breach of the agreement.

Held, also, per FERGUSON, J., that to bind the corporation by an executory contract to purchase from the plaintiff all the gravel required for a portion of their road for an indefinite and protracted period, would require an agreement under their corporate seal.

Judgment of ARMOUR, C.J., affirmed.

F. A. Anglin, for plaintiff. *Riddell*, Q.C., and *V. Sinclair*, for defendants.

Boyd, C., Ferguson, J., Meredith, J.]

[Oct. 8.

FOSTER v. IVEY.

Mortgage—Covenant of mortgagor—Enforcement—Dealings between mortgagee and assignee of equity.

The relations which exist among mortgagee, mortgagor and assignee of the land who has agreed to pay the mortgage, are not those which obtain among creditor, surety and principal debtor.

Aldous v. Hicks, 21 O. R. 95, approved.

Nor should the doctrine of discharge applicable to the case of an ordinary surety be extended to the case of a mortgagor where no actual prejudice has arisen.

So long as the covenant to pay endures, the mortgagor is liable to pay when sued by the mortgagee; his equitable right is, upon payment, to get the land back, or to have unimpaired remedies against his assignee if he has sold the land; and if those rights can be exercised by him at the time he is sued, it is immaterial that at some previous time there was such dealing between his assignee and the mortgagee as would then have interfered with such rights.

Mathers v. Helliwell, 10 Gr. 173, explained.

Dictum of MACLENNAN, J. A., in *Trust and Loan Co. v. McKenzie*, 23 A. R. 167, dissented from.

Barber v. McCuaig, 24 A. R. 492, 29 S.C.R. 126, followed.

D. W. Saunders and Cattnach, for plaintiff. *Hellmuth*, for defendant.

Boyd, C.]

IN RE RYAN.

[Oct. 8.

Administration order—Discretion to refuse—Rules 946, 954—Fund—Savings deposit—Survivorship.

There is now a discretion under Rules 946 and 954, in dealing with applications for administration orders, and the judge or officer is not obliged to grant a summary order unless it appears that some good result will follow.

Order refused where the widow of an intestate was clearly entitled to a fund which was the only matter in dispute.

Where a husband deposited money with a savings company and caused an account to be opened in the names of himself and his wife jointly, "to be drawn by either or in the event of the death of either to be drawn by the survivor," and it appeared by her evidence, uncontradicted, that money of hers went into the account and that both drew from it indiscriminately:—

Held, that she was entitled as survivor to the whole fund.

W. T. J. Lee, for applicants. *Home Smith*, for widow.

Meredith, C. J.]

GIBSON v. NELSON.

[Oct. 10.]

Notice of trial—Close of pleadings—Rule 262.

A reply delivered by the plaintiff joining issue upon the statement of defence and further alleging that the facts set forth in the defence were no answer to the claim:—

Held, a joinder of issue "simply, without adding any further or other pleading thereto," within the meaning of Rule 262; and therefore that when it was delivered the pleadings were closed, and a notice of trial thereupon served was regular.

D. L. McCarthy, for plaintiff. *J. H. Moss*, for defendant.

Boyd, C.]

LANGLEY v. VAN ALLEN.

[Oct. 24.]

Assignments and preferences—Secret agreement—Onus—Voluntary payments—Attack on—Assignee for creditor—Particular creditors—Privity.

In an action by certain creditors of an insolvent and by his assignee for the general benefit of creditors to recover from the defendants, who were also creditors of the insolvent, certain sums of money paid by the insolvent to the defendants before the assignment under the terms of an alleged secret agreement:

Held, that the onus of proof was on the plaintiffs.

Held, also, that the payments not being procured by unjust oppression or extortion on the part of the plaintiff, but being voluntary, the assignee could not recover.

Review of English cases on this point.

Nor could the other plaintiffs, not being the whole body of creditors, recover, even when using the name of the assignee as plaintiff by virtue of an order under R.S.O. c. 147; and no privity such as would give a right of action was established between the creditor plaintiffs and the defendants by an agreement for an extension of time for payment entered into by these plaintiffs and defendants and the insolvent, prior to the alleged secret agreement.

George Kerr, for plaintiffs. *Staunton, Q.C.*, for defendants.

Boyd, C.] JONES v. LINDE BRITISH REFRIGERATION Co. [Oct. 24.

Master and servant—Secret profits in service—Costs—Jus tertii.

Profits acquired by the servant or agent in the course of or in connection with his service or agency fall to the master or principal.

The manager of a cold storage company, at the request of the company, undertook to advise a meat company as to some changes in their plant, and used his position of adviser to influence the purchase by the meat company of a new plant from the defendants, who had promised him a commission on any order they might receive through his assistance. This was not disclosed to his employers or the meat company.

Held, that the transaction was one in connection with his service as manager of the cold storage company, and he could not recover a commission from the defendants.

The defendants having at first conceded the plaintiff's right to recover, and then paid the money to the cold storage company, taking a bond of indemnity, the action was dismissed without costs.

Riddell, Q.C., for plaintiff. *H. S. Osler*, for defendants.

FIFTH DIVISION COURT, STORMONT, DUNDAS AND GLENGARRY.

TUTTLE v. McDONALD.

Justice of the peace—Fees of—R.S.O. 1897, c. 95, s. 2.

Held, that there is no provision for fees to a magistrate or a constable under the tariffs in R.S.O. 1897, c. 95 or s. 81 of Crim. Code for any proceedings which do not come within the summary jurisdiction of justices.

[Cornwall, Aug. 18. O'REILLY, Co.J.]

The defendant, a justice of the peace for the above united counties, demanded and received from the plaintiff \$9.50 alleged to be due as his own costs and the costs of his constable acting in the matter of a search warrant issued under s. 569 of the Criminal Code, to recover stolen goods, and of a search warrant issued under the same sec., sub-s. *b*, to recover a case of dynamite, in relation to which an indictable offence was sworn to have been committed, contrary to the provisions of s. 101 of the Criminal Code, and also of an unsuccessful prosecution under said s. 101.

The plaintiff now sought to recover the said sum of \$9.50 from the defendant, who retained same on the plea that he was entitled to \$3.00 of said amount to his own use for services as justice of the peace, in above matters, and to \$6.50 alleged to have been paid by him to said constable as the latter's fees in the same matter, and the plaintiff asked to recover said sum of \$9.50 as money had and received for his use and benefit by the defendant. Notice of action was delivered to the defendant, under R.S.O.

1897, c. 88, s. 14, and he consented, in writing, to have the action tried at the ensuing sittings of said court to be held at Morrisburg, on 21st June, last. At the hearing the particulars required to be proved by R.S.O. 1897, c. 88, s. 19, were all admitted. The above statement of facts was also admitted.

R. F. Lyle, for plaintiff. *C. F. Bradfield*, for defendant.

O'REILLY, Co. J., held that the defendant had no right to the \$9.50 or to any part of it. The defendant could only justify charging fees for himself or the constable in either of these proceedings, under the tariff given in R.S.O. 1897, c. 95 or under the tariff in s. 871 of the Criminal Code, 1892, as amended. These tariffs apply strictly to offences coming within the summary jurisdiction of justices. There is in neither tariff any provision for fees in connection with the issuing or executing of search warrants. Petit larceny was a felony and simple larceny was a felony (after the distinction between grand and petit larceny was abolished) and it so remained until the distinction between felony and misdemeanor was abolished. The offence under s. 101 of the Code was a felony prior to the passing of the Criminal Code (see R.S.C. c. 105, s. 5). In England the expenses in connection with prosecutions for felony were made payable out of county rates by 25 Geo. II., c. 36. In this province the costs of the prosecution in cases of felony, when not otherwise provided by law, are to be paid out of the county funds: R.S.O. 1897, c. 102, s. 2, and the fees for serving and executing search warrants are given in the tariff for constables in the schedule to R.S.O. c. 101 as amended. [The learned judge concluded his judgment as follows:] It can hardly be argued that a man who swears to an information to lead a search warrant for the recovery of stolen property, is securing services in the nature of a civil remedy for his own benefit. He is taking a necessary step, if he is acting in a bona fide manner (as we must presume he is) to convict a man whom he believes to have committed a crime, which until recently was a felony. I am not aware of any decision to the effect that the prosecution of a felon or any necessary step or proceeding in the prosecution of a felon, has been held to be a service in the nature of a civil remedy for the benefit of a private individual, and I cannot here so find. By the ancient common law of England, it was an offence for justices of the peace to accept anything "for their office of justice of the peace to be done, but of the king, and fees accustomed, and costs limited by statute." I cannot find that the \$3.00 taken by the defendant for his own use, were fees accustomed, i.e. sanctioned by ancient usage, or costs limited by statute, and I am afraid that if the ancient common law in this regard were still in force in Canada, that the taking of the \$3.00 in this case, might bring defendant within its provisions. The amount taken for the constable is said to have been paid over to him, and I have no doubt has been, but I consider that the defendant was acting unlawfully in taking the \$9.50, and I consider that it would be highly improper for me, by joining the constable as a defendant, to recognize in any way the alleged bargain between the

plaintiff and defendant, by which the plaintiff is said to have agreed to pay costs not lawfully chargeable before the defendant would consent to put the machinery of the criminal law in motion. It is contrary to the policy of the law that justices of peace should be allowed to make such bargains, and it would be a very shocking thing to allow them to prevail in a court of law. The defendant must as best he can, deal with the constable, but the plaintiff cannot be here considered as having any privity with the constable, and I give judgment against the defendant for \$9.50 and costs to be paid in fifteen days.

Province of Nova Scotia.

SUPREME COURT.

Full Court.]

QUEEN v. QUINN.

[Feb. 14.

Theft—Conviction of minor under age of 16—Form of convictions—Not necessary to state age or religion—Cr. Code s. 820—Words “shall be good and effective to all intents and purposes.”

Defendant was convicted before the Stipendiary Magistrate of the City of Halifax of the offence of stealing the sum of \$30 and was sentenced to be imprisoned for the term of three years in the Halifax Industrial School, a reformatory for boys of the Protestant faith.

His discharge was sought upon habeas corpus on the grounds that the conviction did not shew that defendant was a Protestant or that he was under the age of 16 years.

Held, dismissing the application, that neither the age nor the religion of defendant had anything to do with the offence of which he was convicted, and that it was not necessary that they should be stated in the conviction.

The Code, s. 820, provides that “the justices before whom any party is summarily convicted of any offence hereinbefore mentioned may cause the conviction to be drawn up in the form U.U. in schedule one hereto, or in any other form to the same effect, and the conviction shall be good and effectual to all intents and purposes.”

Held, that the intention no doubt was to dispense with recitals and averments in the particulars mentioned, and that the words “shall be good and effectual to all intents and purposes” might be regarded as the equivalent of a legislative declaration that it should not be necessary to refer in the conviction to the age of the party, or to the justice’s opinion on that subject.

Held, that the power of determining the age or apparent age of the

party before him was given exclusively to the justices, and following *Rex v. Simpson*, 1 Str. 46, that it must be assumed that he exercised it.

Full Court.] WILSON v. WINDSOR FOUNDRY CO. [March 14.

*Contract in writing—Receipt of parol evidence to vary or supplement—
Burden of proof—Concluded agreement.*

Plaintiffs who carried on business in Montreal as co-partners under the name of A. R. W. & Co. brought an action against defendants to recover \$350; price of an engine which defendants had ordered from them in writing, through plaintiff's agent W.

The order addressed to plaintiffs, and signed by defendants was in the following form :

"Please furnish one fifty horse power engine for which we agree to pay you \$350, delivered in Halifax. Shipment to be made as soon as possible." The main defence set up to the action was that at the time defendants ordered the engine they supposed and were led to believe that they were dealing with a company carrying on business in Toronto under the name of A. R. W. & Co., Ltd., with which they had had previous dealings, and which at the time had in its possession a crusher belonging to defendants of the value of \$780, which it was agreed was to be accepted in payment for machinery to be ordered by defendants. The learned trial judge found as a fact that the business carried on in Montreal was distinct from that carried on in Toronto, but that at the time the defendants gave the order in question they did so under the belief that they were contracting with the Toronto concern, and that there was everything in the surrounding circumstances to lead to the belief that the businesses carried on in Montreal and Toronto were one and the same, particularly the letter heads of the Toronto company which described the Montreal business as one of their branches. For these reasons the learned trial judge held that plaintiffs were bound by the bargain made by their agent W., and on the ground that it was not inconsistent with the written agreement to prove that payment was to be made in some other way than by cash, received evidence of the agreement relied upon by defendants as to the receipt of the crusher in the possession of the Toronto company in payment for the machine ordered.

Per McDONALD, C.J., RITCHIE, J. concurring.

Held, that the evidence fully supported the finding of the trial judge that the acceptance of the crusher in payment for the engine ordered was a term of the contract between the parties.

Held, also, that the evidence of the agreement was properly received on the grounds stated by the learned trial judge in his judgment.

Per WEATHERBE, J., MEAGHER, J. concurring.

Held, that the order delivered by defendants to plaintiffs' agent being on its face a complete agreement, parol evidence was inadmissible to vary

its terms either as to the mode of payment or as to the parties with whom it was made.

Per WEATHERBE, J.

Held, that the proof of the written instrument signed by defendants threw the burden upon them of establishing their defence.

Per MEAGHER, J.

Held, that in the absence of evidence of the acceptance by defendants of the offer said to have been made by the Toronto company to accept the crusher in payment for machinery to be ordered, or the amount to be allowed therefor, there was no agreement concluded between the Toronto company and defendants which could be assumed by the plaintiffs.

W. E. Roscoe, Q.C., and *W. M. Christie* in support of appeal. *B. Russell*, Q.C., contra.

Province of Manitoba.

QUEEN'S BENCH.

Killam, C.J.]

ROGERS v. CLARK.

[Oct. 9.

Pleading—Action for malicious prosecution—Striking out paragraphs of defence as embarrassing—Queen's Bench Act, 1895, rules 280, 283, 293, 298, 301 and 318.

Application to strike out paragraphs of the defence in an action for malicious prosecution. The paragraphs objected to set up certain alleged facts and information given to the defendant tending to justify his belief in the plaintiff's guilt, and that the defendant had laid all the information received by him before the magistrate who issued the warrant, and before counsel who advised the commencement of the prosecution complained of, also that the plaintiff had been in possession of animals which he was accused of stealing, without shewing that it was recent possession. It was further alleged that certain facts were shewn by evidence taken upon the first charge without information from other sources had been received, without specifying these sources.

The objections relied on were that these facts and information and the advice of counsel and magistrate were only evidence of reasonable and probable cause which should not, under rule 298 of The Queen's Bench Act, 1895, be set out in detail; and that sufficient was not stated to shew reasonable and probable cause absolutely, as the information and inquiry may not have been sufficient to warrant belief of guilt, and the sources of the information were not stated.

Held, 1. That a simple traverse of the plaintiff's allegation of the want of reasonable and probable cause is sufficient in the statement of

defence without alleging the facts constituting reasonable and probable cause.

2. That the paragraphs objected to were calculated to make it doubtful whether the plaintiff could safely go to trial leaving the allegations contained in them upon the record, as the defendant had left it open for himself to prove other and distinct facts for the purposes of this defence, and that the plaintiff might be misled into assuming the allegations therein to be all that he had to meet, and for that reason they ought, under rule 318, to be struck out.

Application granted, costs to be costs in the cause to the plaintiff.

T. H. Metcalf, for plaintiff. *C. H. Campbell*, Q.C., for defendant.

Province of British Columbia.

SUPREME COURT.

Full Court.]

KING v. BOULTBEE.

[Sept. 10.

Practice—Garnishee proceedings—Order that money remain in court until new action commenced—Whether nullity or not.

Appeal from order of FORIN, Co. J. The action was commenced in the County Court of Rossland on 28th Oct., 1899, to recover \$171, and a garnishing summons was also issued and served on the garnishee who, on 30th Oct., paid into court \$173.70. On 17th Nov. an order was made setting aside all the proceedings but ordering that the moneys in court remain to abide the result of an action to be commenced forthwith in respect to the same cause of action. The order also provided that the question as to whether the moneys were attachable should be determined as of the date of the issue of the garnishing summons so set aside. The new action was commenced on 18th November.

On 21st Nov., the defendant assigned the moneys then in court, and on 14th Feb., 1900, a summons was taken out in the first action on behalf of the defendant and the assignee for the payment out of court of the moneys to the assignee. This summons was dismissed, and the defendant and the assignee appealed. The order of 17th November was not appealed.

Held, per McCOLL, C.J., and WALKER, J., dismissing the appeal, that the order of 17th Nov. was not a nullity, and as it was not appealed against it was valid. IRVING and MARTIN, JJ., dissenting. Appeal dismissed.

Duff, for appellants. *MacNeill*, Q.C., for respondent.

 COUNTY COURT.

Martin, J.]

DILLON v. SINCLAIR.

[Oct. 13.

Small debts court—Jurisdiction of—Debt—Mechanics' lien.

Appeal to the County Court of Atlin from a decision of a magistrate of the small debts court in favour of the plaintiff in an action to enforce a mechanic's lien under ss. 26 and 27 of the Mechanics' Lien Act.

Held, that an action to enforce a mechanic's lien is not one of debt within the meaning of s. 2 of the Small Debts Act. Appeal allowed.

Sawers, for appellants. *Jenns* and *W. P. Grant*, for respondent.

 Book Reviews.

Attachment of Debts ; Receivers by way of Equitable Execution and Charging Orders on Stocks and Shares, by MICHAEL CABABE, of the Inner Temple, barrister-at-law. Third edition. London: Sweet & Maxwell, Ltd., 3 Chancery Lane, Law Publishers, 1900.

Mr. Cababe has evidently a practical and analytical turn of mind. He does his work well and gives to the profession a very useful little book. Practitioners in this country will find it an excellent summary of the law in England in connection with the matters above referred to. The appendix contains a number of forms of summonses, orders, affidavits, etc., some of which may well be adopted for use here.

The Living Age.—Boston, U.S. : This old friend comes with pleasant and continuous regularity. The number for October 27, is of especial interest. Japan and the new far East from the *National Review*, is very timely. Italian Anarchism ; The old Golf and the new ; Fishes and their meals, and the Employment of women will appeal to various classes of readers, whilst those who desire lighter literature in the way of fiction are also well supplied. We strongly recommend this publication to our readers as the best value for their money (\$6 per annum) that we know of.

 Flotsam and Jetsam.

U. S. DECISIONS.

COMMON CARRIERS.—The right of passengers to carry with them small packages of merchandise is held, in *Runyan v. Central R. Co.* (N.J.), 48 L.R.A. 744, to be one that is not given by the common-law contract of carriage and for which usage must not only be clear and explicit, but also something more than mere accommodation acquiesced in for a time by the carrier.

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NO. 22.

Lord Alverstone is the eighth Lord Chief Justice who has been appointed during the present century; the others being Lords Ellenborough, Tenterden, Denman, Campbell, Cockburn, Coleridge and Russell. Like many other eminent judges in England Lord Alverstone was not less known as an athlete than as a scholar. Sir A. L. Smith, whilst at the Bar, though not possessing many of the qualities of an advocate, acquired by his more solid gifts a very large practice, and was promoted to a judgeship without taking silk.

The appointments of Lord Alverstone (Sir Richard Webster) as Lord Chief Justice of England, and of Lord Justice A. L. Smith to the Mastership of the Rolls, vacated by Lord Alverstone receive the hearty commendation of the English legal journals. Both of these judges are said to possess judicial gifts of a very high order, having both proved their qualifications for the positions to which they have been appointed, and eminent for their learning, their industry and their courtesy. Such commendations must be pleasant reading for both profession and public in England, and are not without their lesson to those who are responsible for judicial appointments in other countries, including our own Dominion.

Mr. Justice Stirling has been taken from the Chancery Division of the High Court of Justice in England to fill the vacancy occasioned by Lord Alverstone's promotion. Mr. Matthew Ingle Joyce succeeds Mr. Justice Stirling in the Chancery Division. It is delightful to read the commendations of the English periodicals on these appointments. The *Law Times* says of Mr. Justice Stirling: "A perfect temper and a judicial temperament accompanied with great clearness of intellect and a large knowledge of law combine in Mr. Justice Stirling, to make an admirable judge." The *Law Journal* says of Mr. Joyce that "His elevation to the bench has long been expected, and will be very popular. His wide experience and sound legal knowledge should make him an ideal

judge." Why do not those in authority in this country seek so to make their judicial appointments that they may receive similar congratulations from the profession?

It may as well be said plainly that at the present time there is something approaching a dread in the professional mind, that an appointment may be made to the vacancy in the Ontario High Court which will not meet the requirements of the situation. Certain it is that some of those whose names have been referred to in the public press as possible appointees, are not entitled either from their attainments or experience to the distinction, and of some others it may be said that they do not possess the judicial qualities which would seem to be necessary. Appointments to the bench are on a plane different to any others. Any serviceable political hack may become a useful employee in the customs, post office or other branch of the civil service. But judges should be selected from the very best available material quite apart from political obligations, class feelings or religious faith. The profession generally feel that much depends on the appointment to the present vacancy, as it will indicate the principle on which future judges will be selected by the Government. Happy the country that possesses rulers who are sufficiently free from political bias and so far above all prejudices or considerations as to appoint the best available men to the highest judicial positions.

A recent decision in the Province of Ontario, in the case of *Graves v. Gorrie*, will come somewhat as a surprise to many publishers of literary and artistic works in the Dominion. It has generally been supposed that all the Copyright Acts of the Imperial Parliament were in force in all the colonies. This is so as to literary works, the Imperial Act 5 & 6 Vict., giving copyright in such cases, being expressly made applicable to the colonies. But there appears to be a wide difference as to copyright in works of art, such as paintings, photographs and pictures. In this case the plaintiffs, an English house, were the owners of the copyright in the famous picture by Maud Earle, "What we have we'll hold." The copyright was duly registered at Stationers' Hall under the Imperial Act, 25 & 26 Vict., relating to artistic copyright.

It was contended that this gives them copyright throughout all the colonies. The defendant, who lives in Toronto and is a manufacturer of embossed cards and various advertising devices, had been using the picture, making copies of it and adapting it in different forms in connection with his business. The plaintiffs upon hearing of this applied for an injunction to restrain the defendant from making copies of or using the picture. Mr. Justice Rose who heard the case, in an elaborate judgment reviews the whole question and comes to the conclusion that the Imperial Act 25 & 26 Vict., giving copyright in artistic works, is limited to the United Kingdom and does not extend to Canada. This decision is of great importance, especially at this time, as the whole copyright question is now being considered by the British Parliament, and this view of the law will doubtless be taken into consideration in the framing of their new Copyright Act.

A SOLICITOR'S RETAINER.

In all actions and suits the common law required the actual presence of the parties in propria persona, and admitted only of the substitution of an attorney by grace and favour, it being deemed impracticable, as we are told, for a man to be substituted (attornée) for another, inasmuch as he could not receive the punishment pro alieno delicto, or pay the fine awarded pro falso clamore on being non-suited.

The Statute of Merton, (20 Hen. 3, c. 10) appears to be the first statute conferring the general right to substitute an attorney in lieu of personal attendance in civil actions. As the practice is now to prosecute and defend by solicitor, it may be of interest to glance at some of the authorities on the contract between the client and his solicitor.

I. Evidence of retainer.—As between solicitor and client, the appointment of a solicitor is governed by the general law applicable to ordinary agents; the act of the client by which he engages a solicitor to manage his cause or perform other services for him being termed a retainer. A solicitor can, generally, be appointed by parol, or the authority to act may be implied from the circumstances or the conduct of the parties. But a written retainer is always

advisable, and where it is dispensed with the solicitor runs the risk of having his authority to act disputed.

In *Allen v. Bone*, 4 Beav. 493, Lord Langdale, M.R., said : " It is the duty of a solicitor to obtain a written authority from his client before he commences a suit. If the circumstances are urgent, and he is obliged to commence proceedings without such authority, he should obtain it as soon afterwards as he can. An authority may however be implied where the client acquiesces in and adopts the proceedings ; but if the solicitor's authority is disputed, it is for him to prove it, and if he has no written authority, and there is nothing but assertion against assertion, the court will treat him as unauthorized, and he must abide by the consequences of his neglect."

In *Tabbemor v. Tabbemor*, 2 Keen 679, the same judge said : " According to the strict practice, there ought to be a warrant in writing to authorize the solicitor to commence proceedings ; it is sometimes, however, dispensed with at the peril of the solicitor ; had the party here acquiesced, it would be another question."

And if the solicitor neglects the precaution of obtaining written evidence of his authority, and the parol evidence is conflicting, the court will give weight to the denial of the client as against the solicitor : *In re Eccles and Carroll*, 1 Chy. Ch. 263. *Scribner v. Parcells*, 20 O.R. 554.

The rule only applies where it is simply oath against oath. Where there is other evidence, direct or circumstantial, in support of the solicitor, there is no rule that prevents the court from acting on the testimony so supported. And the rule does not extend to facts arising after the retainer and during the progress of the litigation : *Re Kerr, Akers & Bull*, 29 Gr. 188.

Where a solicitor brings an action without a proper retainer he may (and usually will) be ordered to pay the defendant's costs between party and party, and the costs of the plaintiff between solicitor and client : *Scribner v. Parcells*, supra. Even if he acted bona fide, under the belief that the person instructing him had authority to instruct him : *Geilinger v. Gibbs*, 66 L.J. Chy. 230.

Where the defendant's father employed an attorney to defend an action brought against his son, and the son knew of the retainer and did not disapprove of it, he was held to be bound by the acts of the attorney in the same way as if he had himself employed

him : *Cameron v. Baker*, 1 C. & P. 268. See also *Kerr v. Malpus*, 2 P.R. 135.

Where the general solicitor of a client invested money on mortgage on her account, and soon afterwards discovering some defect in the title brought an action to recover back the money, the authority to commence the action was presumed : *Anderson v. Watson*, 3 C. & P. 214.

Tabram v. Horn, 1 M. & R. 228, was an action by an attorney against his client to recover the costs of an ejectment action commenced and abandoned. The client had delivered her papers to the attorney telling him "that she was entitled to an estate, and that she would pay him if she recovered it." The attorney took the papers, saying, "that he would do what he could for her," and, without communicating further with her commenced the action. The court held that he had no instructions to commence the action, but only to enquire into the defendant's title,

In *Herr v. Toms*, 32 U.C.R. 423, it was the solicitor who denied the retainer, but the court held the evidence established the retainer so as to make him liable for the negligence of his Toronto agents.

Although a solicitor has no right to institute proceedings without express authority, he may, in the exercise of a general authority given to him by his client, accept service and defend actions without a special retainer for the purpose : *Wright v. Castle*, 3 Mer. 12.

II. Authority to retain solicitor.—There is no doubt that one partner has authority to retain a solicitor to commence and prosecute actions for the firm in the firm name, subject to the right of the other partners, who object, to be indemnified against costs : *Whitehead v. Hughes*, 2 Cr. & M. 318.

Has one partner authority to instruct a solicitor to enter an appearance for the firm ? If *Mason v. Cooper* (1893) 15 P.R. 418, be correctly decided, he has not. In *Lindley on Partnership*, 5th ed. 271, it is said : "One partner may defend an action brought against the firm, indemnifying the firm against the consequences of so doing, if he acts against the will of the other partners." It is submitted that this is a correct statement of the law notwithstanding *Mason v. Cooper*.

Let us look at the authorities cited in support of the decision. *Joyce v. Murray*, R. & J. Dig. 672 ; *Holme v. Allan*, Tay. 348, and *Auff v. Cameron*, 1 P.R. 255, are all cases where one partner gave a *cognovit actionem* against the firm. *Massey v. Rapelje*, 5

C.P. 134, was not a case of partnership at all. As far as the report shews, the defendant who instructed the attorney had no authority, implied or otherwise, to so instruct for the defendant who had not been served. The same remark applies to *Bayley v. Buckland*, 1 Ex. 1. *Roissier v. Westbrook*, 24 C.P. 91, was an action of ejectment against three defendants. There was no partnership or other connection between these defendants. They may have had distinct and even conflicting defences. Unless the same rule applies to a cognovit and an appearance, none of these cases seem to me to have any bearing upon the question. On page 272 of Lindley, almost immediately following the citation I have given, he says one partner cannot give a cognovit; thus drawing a distinction between the authority of one partner to enter an appearance and to give a cognovit. Surely there is a difference in principle between a cognovit, where one partner confesses judgment against all the partners, and an appearance, where he takes the first step towards defending the action on behalf of all the partners.

In *Mason v. Cooper* it was admitted that the service on the one partner was sufficient to maintain a judgment by default against the firm. It certainly is a peculiar result if a valid judgment can be obtained against a firm because the partner served neglects to enter an appearance, but the judgment can be set aside if the same partner enters an appearance to the action. Since *Mason v. Cooper* was decided, the same question came before the Court of Appeal in England in *Tomlinson v. Broadsmith* (1896) 1 Q.B. 386, and it was held that a managing partner had implied authority to direct a solicitor to enter an appearance in an action brought against the partnership. Rigby, L.J. went so far as to say that he did not think it would have made any difference if the other partner had objected, and so informed the solicitor. Lord Esher, M.R., said: "*Goodman v. DeBeauvoir*, 12 Jur. 989, 1037 is a direct and clear authority that one of a number of persons in the position of partners has authority to enter an appearance in an action against the partners." *Goodman v. DeBeauvoir*, does not appear to have been brought to the attention of the court in *Mason v. Cooper*.

One trustee or executor, unless authorized to do so, cannot pledge to a solicitor the credit of his co-trustee or co-executor, although the latter may by his acts or conduct ratify such appointment: *Cordery on Solicitors*, 65. But in *Simpson v. Gutteridge*, 1 Madd. 609, it was stated that one of several executors has power to

confess judgment. A landlord has no authority to retain a solicitor to enter an appearance for his tenant in an action of ejectment against the tenant : *Moran v. Schermerhorn*, 2 P.R. 261.

Although, as a general rule, a corporation must appoint a solicitor under its corporate seal, yet where the Act incorporating a company gave the directors power to appoint officers and agents, and the by-laws of the company authorized the general manager to compromise claims and do other acts which generally require legal advice, it was held that a retainer by the general manager, though not under the corporate seal, was binding on the company : *Clarke v. Union Fire Ins. Co. Caston's case*, 10 P.R. 339. And where the solicitor had instructions to defend a suit, which was discontinued and a new one for the same cause of action commenced, it was held that the original retainer to defend continued in the new suit. *Ib.* But the fact that a solicitor has acted for a trustee does not authorize the solicitor to enter an appearance for the trustee in an action in relation to the trust without any further retainer : *Re Gray*, 65 L.T. 743.

In England a solicitor has no implied authority to pledge his client's credit for the payment of fees to counsel, *Mostyn v. Mostyn*, L.R. 5 Ch. 457. But in Ontario solicitors have such implied authority, and a legal privity exists between counsel and client so as to enable the counsel to recover his fees from the client. *Armour v. Kilmer*, 28 O.R. 619.

III. **Extent of retainer.**—Although a solicitor has complete authority over an action, and all that is incident to it, he has not by virtue of his retainer in an action any power over matters which are collateral to it : *Swinfin v. Lord Chelmsford*, 26 L.J. C.P. 97. A solicitor retained to collect a debt is not entitled to interplead without a further retainer. Proceedings in interpleader are substantially a second action : *Hackett v. Bible*, 12 P.R. 482 ; *James v. Bicknell*, 20 Q.B.D. 164.

The retainer in an action continues until the judgment is worked out. Until that time the solicitor on the record must be taken, as between him and the opposite party, to represent the client, unless the client not only discharges him, but substitutes another solicitor on the record : *De la Pole v. Dick*, 29 Ch. D. 351. The solicitor of a party has not, as such, any authority to enter into a contract for the sale of the client's lands : *Cameron v. Brooke*, 15 Gr. 693.

The common retainer to collect a debt imposes upon the

solicitor no duty to pursue any collateral remedies, such as to examine the defendant, or to attach debts due to him : *Darling v. Weller*, 22 U.C.R. 363.

According to Coke the authority of the solicitor in an action extends to the suing out execution on the judgment. *Searson v. Small*, 5 U.C.R. 259, is sometimes cited as an authority in support of the statement that the solicitor in the action is not supposed to issue execution without special directions. That, however, was an action against a solicitor for delaying to issue an execution under a retainer to prosecute and defend the action, and on demurrer the declaration was held bad in that it did not shew any request to issue execution or that the debtor had any goods from which the money could have been made. Robinson, C.J. said : " We know that the practice constantly is for the plaintiff's attorney not merely to carry on the suit to judgment, but to enforce the judgment by execution ; and this he considers part of his duty without any new or special authority or instructions."

An attorney ad litem has no authority to bind his client not to appeal by an agreement with the opposing attorney that no appeal would be taken : *La Societe Canadienne-Francaise v. Daveluy*, 20 S.C.R. 449. But see *Wilson v. Huron*, 11 C.P. 548.

Where a client has disappeared the solicitor is still bound to accept service ; and there appears to be no process by which a solicitor can of his own motion remove his own name from the record, notwithstanding that he has ceased to act : *Cordery*, 100.

IV. Client entitled to personal services of solicitor.—A client who retains a solicitor is entitled to the personal services of the solicitor. Where the solicitor had an office in the country where he carried on business by means of an articulated clerk, it was held he could not recover in respect of business transacted there by the clerk alone : *Hopkinson v. Smith*, 3 Starkie, 75. So where a firm of solicitors is retained and the partnership is dissolved, the dissolution terminates the retainer, as the client is deemed to have contracted for the united exertions of all, and is entitled to treat the solicitors as having discharged themselves : *Lindley on Partnership*, 439 ; *Cholmondeley v. Clinton*, 19 Ves. 261.

In the case of *Cook v. Rhodes*, 1815, in an action to dissolve an injunction, upon disputes between partners as attorneys and solicitors, the Lord Chancellor laid it down as clear that they could

not, without the consent of their client, who confided to their joint skill, dissolve their partnership and turn him over to one of them ; though they might give him notice that they would not be any longer concerned for him, and have their bill to that time settled. See notes p. 190, 13 R.R.

If a firm of solicitors is retained and one dies, the retainer continues to the surviving partner or partners: *Alchin v. Buffalo Ry. Co.*, 2 Chy. Ch. 45. But the mere successor in business of a deceased solicitor cannot be treated as a solicitor in the cause without a new appointment: *Collins v. Arnold*, 1 B.C.R. 217.

V. Retainer constitutes an entire contract.—The employment of a solicitor to conduct or defend an action constitutes an entire contract ; and a solicitor who withdraws before its termination cannot sue for the costs he has incurred, unless his withdrawal was for good reason and upon reasonable notice: *Underwood v. Lewis*, 1894, 2 Q.B. 306.

In *Harris v. Osbourn*, 2 C. & M. 629, Lord Lyndhurst says: "I consider that when an attorney is retained to prosecute or defend a cause, he enters into a special contract to carry it on to its termination ;" and Baron Parke in *Whitehead v. Lord*, 7 Ex. 691, says: "The rule was correctly laid down in *Harris v. Osbourn* that an attorney under a retainer to conduct a suit undertakes to conduct the suit to its final termination, and he cannot sue for his bill until that time has arrived."

This rule was modified, if not somewhat impaired, by the decision of Jessel, M.R., in *In re Hall & Barker*, 9 Ch. D. 538, where he says: "I cannot see any reason for assuming that a solicitor undertaking a business of this complicated nature, such as the administration, whether of a dead man's estate or an insolvent man's estate, which may give rise to a score of suits, and may occupy a score of years, before it is finally wound up, should be held to do a single and entire thing, and not be entitled to be paid any remuneration until the single and entire thing is done. I think it is reasonable that a solicitor should not be held to have entered into such a contract." And further on he says: "The transaction amounts to this in my opinion. We have done so much work ; there is a convenient break in the business, up to which time we have made up our bill of costs ; please pay us up to that time, and

when the outstanding matters are concluded, which we hope will be shortly, we will send in a further bill."

Some of the judges have tried to confine the principles of a "convenient break in the business" to such actions as were formerly purely Chancery actions, and to exclude it altogether from common law actions; but in *In re Romer & Haslam* (1893) 2 Q.B. 286, Kay, L.J., said: "But when we apply that doctrine (of an entire contract) to a long and complicated litigation which may not be completed for years, and may involve questions of difficulty, I care not in what tribunal the litigation is, it may be unreasonable to treat it as an entire contract in the sense that a solicitor is to have no right to send in his bill of costs until the whole matter is finally concluded. Accordingly, the courts, without infringing upon the old rule, have said that the proper mode of applying the rule is that in such a case the solicitor may at any reasonable break in the litigation send in his bill of costs up to that time and demand payment."

In *Underwood v. Lewis*, supra, it was argued that the strict rule of an entire contract laid down by the old cases had been so materially modified that all that is necessary to entitle a solicitor to withdraw and sue for his costs, is that he should give his client reasonable notice of his intention to do so. Lord Esher, M.R., dissented from that view very vigorously, and said that if the decision in *In re Hall & Barker* were to be so read, he should be of opinion it must be over-ruled. In fact Lord Esher seemed inclined to push the doctrine to an unreasonable length against the solicitor, when he says: "As to the nature of reasonable ground, I am not quite clear, and I doubt whether anything which may happen to the solicitor himself would be sufficient. It has been suggested, that if a great misfortune, such as a severe illness, happened to him, or if his death occurred, that would put an end to his obligation under the contract while not depriving him of a right to sue for what had in fact been done. If the captain of a ship who has contracted to navigate the ship from one port to another, dies in the middle of the voyage, his executors cannot say that his death has altered the contract and that he ought to be paid wages from week to week or month to month. It may be that death or illness would form a good ground why nothing should be charged against a solicitor, but it cannot be said that it has altered the contract from an entire contract to a contract to pay on a quantum meruit before the end of the suit." It must be remembered, however, that this was a

mere dictum, and not necessary to the decision of the point involved in the case at bar. And Davey, L.J., referring to this, adds to his judgment: "I only desire to say I express no opinion as to the effect of the death or illness of the solicitor." There is some comfort to the solicitor to know that in case of his death, although he may not be paid for work he has done on unfinished actions, he will not be liable to his client in damages for dying at such an inconvenient time.

This brings us to the question, what will justify a solicitor in refusing to proceed in the action after reasonable notice? Or, as the Master of the Rolls puts it in the case I have just quoted from: "What are the exceptions which judges have added to Lord Eldon's rule?" and he answers: "One of them is this: since a solicitor cannot reasonably be asked to pay disbursements out of his own pocket, the contract implies a provision that he may withdraw if his client refuses to supply him, because every person of sense would come to the conclusion that the parties had contracted with the knowledge of such implication."

In *Steele v. Scott*, 2 Hogan, 141, it was held that where a client by his conduct makes it impossible for his solicitor to continue longer with him, the solicitor is justified in refusing to continue the proceedings. It is not stated what the conduct of the client was, but apparently it consisted of imputations cast upon the character or conduct of the solicitor. The Master of the Rolls considered that the client had substantially discharged the solicitor.

The death of the client, as it terminates the solicitor's retainer, enables the solicitor to recover his costs before the action is terminated: *Whitehead v. Lord*, 7 Exch. 691. So also for other reasonable causes, as a dissolution of partnership, or his retirement from business, or the insolvency of his client, the attorney may throw up his employment, and may recover his costs for what he has done: Pulling, 327. But a solicitor cannot refuse to proceed on the ground of non-payment of disbursements if he has undertaken the action on the understanding that the plaintiff has no money to pay costs: *Harrington v. Binns*, 3 F. & F. 942.

What is reasonable notice must necessarily depend largely on the facts of each case. I have found only two cases where the point has been discussed. In *Wadsworth v. Marshall*, 2 Cr. & J. 665, the court refuses to compel an attorney, even after notice of trial, to carry the cause to court, unless the client supplied him with

funds. And where the commission day was on Thursday, and on the previous Saturday the attorney gave notice to his client that he would not deliver briefs to counsel unless he was furnished with funds, and the funds not being furnished, counsel was not instructed and a verdict was given against the client. In an action by the client against the solicitor for damages, the jury found that the client did not have sufficient notice, and the court held the finding was justified: *Hoby v. Buitt*, 3 B. & Ad. 350.

C. H. WIDDIFIELD.

Picton, Ont.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

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FRAUDULENT PREFERENCE—MONEY LENT FOR SPECIFIC PURPOSE—REPAYMENT BY DEBTOR AFTER ACT OF BANKRUPTCY—INTENTION TO PREFER.

In re Vautin (1900) 2 Q.B. 325, involves a nice question under the law of bankruptcy. A debtor being in difficulties applied to a friend to lend him £1000 on the understanding that it would be sufficient, with other money the debtor was getting, to clear off all his liabilities and that it was to be so applied, and security was to be given for the £1000. On the same day he absconded, thereby committing an act of bankruptcy, and without giving the promised security, or applying the £1000 in payment of his debts. The debtor cashed the cheque for £1000, and in the evening of the day he absconded he posted a letter to the lender containing two £500 Bank of England notes and stating that he returned the money. There was no express agreement that the money should be returned if not applied in payment of debts, or if security was not given as promised. The trustee in bankruptcy claimed that the repayment of the £1000 was a fraudulent preference and that he was entitled to recover it from the lender. Wright, J., rejected the claim on three grounds, (1) that the money had been lent for a specific purpose which had not been carried out; and also (2) on the agreement that security should be given therefor, which had

not been done, and, even if the trustee were entitled to the money, he would be bound by the agreement that security was to be given therefor, and (3) that there was no preference because the debtor repaid the money, not with the intention of giving a preference, but because he bona fide believed he was bound by contract so to do.

INSURANCE (MARINE)—SEAWORTHINESS, IMPLIED WARRANTY OF.

Sleigh v. Tyser (1900) 2 Q.B. 333, was an action brought on a policy of marine insurance, in which the defence was that there was a breach of an implied warranty that the ship was seaworthy. The policy was on cattle and provided that the fittings of the ship were to be approved by Lloyd's surveyor. They were so approved. During the voyage, however, a large number of the cattle died, owing partly to the insufficiency of the appliances for ventilation, and partly to the insufficient number of cattlemen appointed to attend them. Bigham, J., held that in both these respects the ship was unseaworthy; and that the implied warranty of seaworthiness was not excluded by the express provision as to the fittings. With regard to the ventilation appliances he agreed that they might come within the term "fittings," but he was of opinion that the stipulation that the fittings should be approved by Lloyd's agent did not supersede the implied warranty of seaworthiness in respect of ventilation, and that that warranty extended to all matters necessary for the safe carriage of the cargo in question.

INSURANCE (MARINE)—CAPTURE—PROPERTY OF ALIEN ENEMY—INTENTION TO WAGE WAR—SEIZURE BY BELLIGERENT STATE OF PROPERTY OF ITS OWN SUBJECTS.

Driefontein Gold Mines v. Janson (1900) 2 Q.B. 339, was an action on a marine policy of insurance effected by the plaintiffs, a corporation doing business in the Transvaal, insuring a consignment of gold, inter alia, from capture while in transit from mines in the Transvaal to the United Kingdom. Shortly before hostilities broke out between the Transvaal and Great Britain the gold was seized by the Transvaal Government. The defendants contended they were not liable because the plaintiffs were alien enemies, and the loss was sustained by seizure by the Transvaal Government for the purpose of supplying it with funds to levy war against Her Majesty. The defendants waived all objections

on the ground that the plaintiffs were aliens and could not sue while the war lasted, and agreed that the case should be dealt with as if the war were over. Mathew, J., held that the fact that war had not been declared prevented the seizure, though made in contemplation of hostilities, from being an hostile act; and that the subsequent breaking out of the war did not invalidate the contract of insurance; and that the case was not within the rule of law which forbids the insurance by a British subject of an alien enemy's property; that the loss was covered by the policy and that the plaintiffs were accordingly entitled to recover.

INSURANCE (MARINE)—COLLISION CLAUSE—CONSTRUCTION—SUM PAID "IN RESPECT OF INJURY TO SUCH OTHER SHIP OR VESSEL ITSELF"—EXPENSE OF REMOVAL OF WRECK.

Burger v. Indemnity M. M. Assurance Co. (1900) 2 Q.B. 348, was also an action on a policy of marine insurance in which the point determined by the Court of Appeal (Smith, Williams and Romer, L.JJ.) overruling Mathew, J., is simply this, that the expenses of removing a ship wrecked by collision with the vessel assured, do not come within the terms of "sums paid in respect of injury to such other ship or vessel itself" of which the policy provided, in the event of a collision, the insurers would pay a proportionate part.

COMPANY—CALLS ON FORFEITED SHARES.

In Ladies' Dress Association v. Pulbrook (1900) 2 Q.B. 376. The action was brought by a liquidator of a joint stock company to recover calls which had been made, prior to forfeiture, on certain shares which had been forfeited. The articles of association provided that any member whose shares had been forfeited should, notwithstanding the forfeiture, be liable to pay all calls owing on the shares at the time of forfeiture. The defendants resisted the claim on the ground that the shares had been forfeited more than a year before the commencement of the liquidation, and therefore the defendants were not liable to be placed on the list of contributories. But the Court of Appeal (Smith, Williams and Romer, L.JJ.) agreed with Ridley, J., and overruled this contention, being of opinion that the defendants were liable, not as contributories, but as debtors of the company. The case also deals with another point as to the validity of certain resolutions for the reduction of capital which does not appear to call for notice here.

**MASTER AND SERVANT—INJURY TO WORKMAN ON HIS WAY TO WORK—
ACCIDENT "IN COURSE OF EMPLOYMENT."**

Holmes v. Great Northern Ry. (1900) 2 Q.B. 409, is a very similar case to *Holness v. McKay* (1899) 2 Q.B. 319 (noted ante vol. 35, p. 707). An engine cleaner employed by the defendants at their station at King's Cross, was directed by the defendants to work in a new engine-shed at Hornsey, about four miles distant. He was conveyed by the defendants free of charge to and from his work at Hornsey, and while crossing the line at the station at Hornsey in order to get to his work he was killed by a passing train. The Court of Appeal (Smith, Williams and Romer, L.JJ.) held that the accident took place in the course of his employment.

DESERTION BY WIFE—REFUSAL OF MARITAL INTERCOURSE.

Synge v. Synge (1900) P. 180, deserves attention, as bearing on the law of alimony, inasmuch as Jeune, P.P.D., held that the refusal by a wife of marital intercourse with her husband is desertion by her, and she cannot allege desertion by her husband if in consequence he refuses to live with her.

**PRIVATE INTERNATIONAL LAW—DOMICIL—FRENCH SUBJECTS—WILL—RE-
VOCATION OF WILL BY SUBSEQUENT MARRIAGE—HUSBAND AND WIFE.**

In re Martin, Loustalan v. Loustalan (1900) P. 211, is a case brimful of difficult questions of private international law. The question at issue was whether a will made by a Frenchwoman domiciled in England was revoked on her subsequent marriage in England to a Frenchman under the following circumstances. The testatrix was an unmarried Frenchwoman living in England at the date of the will, and she was then living in service. She subsequently set up a laundry business and married a Frenchman who had been accused and, in his absence, convicted of crime in France, and who had fled from that country to escape punishment. There was no settlement. After marriage the husband assisted to carry on his wife's laundry business and after the lapse of twenty-two years he left his wife, returned to France, and had ever since lived there, the lapse of twenty years having, according to French law, relieved him from any further liability for his alleged offence. The question as to whether or not the ante-nuptial will had been revoked or not caused a difference of opinion. Jeune, P.P.D., held that the domicile of the parties throughout was French, and that

the effect of marriage on the will was governed by French law so far as the will related to moveables, and under that law it was not revoked, and therefore entitled to probate in the English Court—with this Lindley, M.R., agreed with the qualification that the will did not affect leaseholds. Rigby and Williams, L.JJ., however, disagreed and held that both the husband and wife had acquired an English domicile at the time of the marriage, and that the English law applied and that the previous will made by the wife was revoked by the marriage, and that this was unaffected by the husband, and consequently the wife, afterwards reacquiring a French domicile. As to whether the law, that marriage revokes a previously made will, is a part of the matrimonial law, or testamentary law of England, the judges were also not agreed. Jeune, P.P.D., was of opinion that it is part of the testamentary law. Williams, L.J., on the other hand considers that it is part of the matrimonial law.

PATENT—JOINT GRANT—SURVIVORSHIP—COVENANT BY JOINT OWNERS TO ASSIGN
—APPEAL—CROSS APPEAL—RULE 870—(ONT. RULE 813).

In *National Society for Distribution of Electricity v. Gibbs* (1900) 2 Ch. 280, the judgment of Cozens-Hardy, J., (1899) 2 Ch. 289 (noted ante vol. 35, p. 714) has failed to stand the fire of the Court of Appeal. The facts, it may be remembered, were simple. Certain patents for inventions had been granted to Goulard & Gibbs, and Goulard & Gibbs had entered into a covenant to assign the patents to the plaintiffs, and the agreement provided that the assignment should contain a covenant by the vendors that all the patents were valid and in nowise void or voidable. Goulard died before the assignment had been executed, and his administratrix refused to join in the assignment or the covenant above referred to. Cozens-Hardy, J., held that the patentees were joint owners and that Gibbs, the survivor, alone could be required to assign, or to enter into the covenant. The Court of Appeal (Lindley, M.R., and Rigby and Collins, L.JJ.) held that the effect of the agreement was that the transfer should contain joint and several covenants by the vendors, and that the liability of the administratrix to the plaintiffs must be ascertained on that footing—and a declaratory order was made to that effect, and the case was remitted for trial. A point of practice also arose on the appeal as to which the Court of Appeal express an opinion which it may

be useful to note, to the effect that where a claim and counter claim are dismissed at a trial and the defendant appeals from the judgment on the counter claim, it is not open for the plaintiff, by a notice served under Rule 870 (Ont. Rule 813), to appeal from the judgment on the claim, but in order to do so he must bring a cross appeal. But in the present case the judge had so linked the action and counter claim together, with the acquiescence of counsel, that a cross notice was, in this case, treated as a cross appeal.

VENDOR AND PURCHASER—REPUDIATION BY PURCHASER AFTER PART PAYMENT—SPECIFIC PERFORMANCE—LACHES.

Cornwall v. Henson (1900) 2 Ch. 298, is another case in which the judgment of Cozens-Hardy, J., (1899) 2 Ch. 710 (noted ante p. 89) has failed to be upheld by the Court of Appeal. As the facts are pretty fully stated in our previous note of the case, it is only necessary here to say that in the judgment of the Court of Appeal (Webster, M.R., and Rigby and Collins, L.JJ.) the conduct of the plaintiff did not amount to an abandonment of the contract, and the vendor was not justified in treating the contract as abandoned; but, at the same time, the Court held that the plaintiff's laches disentitled him to specific performance, but the Court of Appeal considered him entitled to recover damages which were assessed at £125. The report is silent as to the question of costs.

COMPANY—DIRECTORS—IMPROPER ALLOTMENT OF SHARES TO DIRECTORS AT UNDER VALUE—DAMAGES, MEASURE OF—PRACTICE—APPEAL—STAY OF REFERENCE PENDING APPEAL.

Shaw v. Holland (1900) 2 Ch. 305, was a case of a shareholder against directors, to make them account to the company of which they were directors, for damages for allotting shares to themselves at an under value, and the question was as to the proper measure of damages. North, J., had held that the damages should be ascertained as to shares sold, on the footing of the difference between the market price the shares realized and that at which they were allotted, and as to shares retained the difference between the market price on the day when the trial ended before him and the price at which they were allotted. The Court of Appeal (Webster, M.R., and Rigby and Collins, L.JJ.) agreed with North, J., as to the measure of damages as to the shares sold, but

as to the shares retained, they considered the difference between the market price on the day of allotment and the price paid, was the proper measure of damages as to them. An application was made to stay the reference as to damages pending an appeal to the House of Lords, but the Court of Appeal refused to make any order, being of opinion that as a general rule proceedings on a judgment should not be stayed pending an appeal, except on special grounds.

PRACTICE—DISCOVERY—PRODUCTION OF DOCUMENTS—PRIVILEGE—BILLS OF COSTS.

In *Ainsworth v. Wilding* (1900) 2 Ch. 315, two points of practice are decided, (1) that mere records of what takes place in chambers in the course of hostile proceedings in the presence of parties on both sides, are not privileged from production, and such entries contained in a bill of costs delivered by a solicitor to his client are not privileged from production by the client; and (2) that correspondence which is protected on the ground of privilege is not rendered liable to discovery merely because it contains statements of fact as to what has taken place in chambers in the course of hostile litigation in the presence of both parties, and therefore letters or statements made by a solicitor to his client containing such statements of fact were not liable to production. It would almost seem that these two propositions are mutually destructive; it may be observed, however, that with regard to the bills of costs no objection was made to their production, but privilege was claimed only for certain entries therein, which was really the point determined by Sterling J., and not the larger question whether the bills were liable at all to production.

RESULTING TRUST—FUND RAISED BY SUBSCRIPTION FOR MAINTENANCE OF POOR PERSON—DEATH OF BENEFICIARY—UNAPPLIED SURPLUS OF CHARITABLE FUND RAISED BY SUBSCRIPTION.

In *re Trusts of Abbott, Smith v. Abbott* (1900) 2 Ch. 326, discusses the doctrine of resulting trusts. The facts were that a fund had been raised by voluntary subscription for the maintenance of two poor persons who had died. There had been no declaration of trust, and the surplus of the fund remained unexpended, and the question presented for Sterling J., to decide was whether the representatives of the deceased beneficiaries or

the subscribers to the fund were entitled to such surplus. The learned judge held that there was a resulting trust in favour of the subscribers.

WILL—LIMITED POWER OF APPOINTMENT—APPOINTMENT MADE PRIOR TO DATE OF POWER—WILLS ACT 1837 (1 VICT. C. 26) SS. 24, 27—(R.S.O. C. 128, SS. 26, 29).

In re Hayes, Turnbull v. Hayes (1900) 2 Ch. 332, is a case that shews, that, notwithstanding the provisions of the Wills Act (1) that every will is to speak as if executed immediately before the death of the testator: 1 Vict. c. 16, s. 24 (R.S.O. c. 128, s. 26); and (2) that a general devise of realty or personalty is to include property over which the testator had a general power of appointment: s. 27, (R.S.O. c. 128, s. 29),—a will purporting to dispose of all property over which at the time of his death the testator should have a disposing power, will not be deemed an execution of a special power of appointment by will, subsequently given to the testator. The facts were that the testator in 1884 made a will whereby he gave all his residue over which he should have any disposing power at the time of his death to trustees, upon trust for sale and conversion, and to pay the yearly income to his wife for life or widowhood. In 1893 the testator's father made a will whereby he gave a power to the testator to appoint a fund by will or codicil in favour of his wife. The father died in 1895, and the testator in 1899, leaving a wife and children, and Byrne, J., held that the will of 1884 could not be construed as an execution of the power subsequently conferred on the testator by his father's will. Section 27 of the Wills Act (Ont. Act, s. 29) he holds, extends only to property over which the testator has a general power of appointment at the time of his death, and he considered the opinion of Shadwell, V.-C., in *Stillman v. Weedon*, 16 Sim. 26, that it also extended to special powers, not to be well founded.

POWER OF APPOINTMENT—GENERAL POWER TO BE EXERCISED BY WILL ATTESTED BY TWO WITNESSES—DONEE OF POWER A DOMICILED FRENCHWOMAN—HOLOGRAPH WILL OF DONEE UNATTESTED.

Barretto v. Young (1900) 2 Ch. 339, is another decision on the subject of the execution of a power of appointment. In this case the power provided that it was to be executed by will attested by two or more witnesses. The donee of the power was a domiciled Frenchwoman, and she left a holograph will unattested, disposing

of all of her estate, which was valid according to French law, and, therefore, admitted to probate in England. It was claimed by the testatrix's next of kin that the will was not an execution of the power. Byrne, J., upheld the contention, being of opinion that where the instrument creating the power prescribes special formalities in the execution of the instrument by which the power is to be executed, it is essential that those formalities shall be complied with, and that it was not enough in the present case that for other purposes the will was a valid will.

WILL—CONSTRUCTION—"DIE UNMARRIED."

In re Chant, Chant v. Lemon (1900) 2 Ch. 345, construes the meaning of the words "die unmarried," contained in a will. By the will in question the testatrix made a disposition of real and personal property in favour of her brother Frederick for life, and after his death in trust for his children or child. "But if he shall die unmarried and without leaving any children or a child who shall attain 21," then the gift was to go over to other parties. Frederick died, leaving a widow, but he had never had any child. Those entitled under the gift over claimed to be entitled, and the question was whether the contingency upon which the gift over was to take effect had happened; on the other hand, the next of kin claimed to be entitled to the property as upon an intestacy. Cozens-Hardy, J., who tried the case, came to the conclusion that the will was to be construed as if the testatrix had said "if he shall die without leaving a wife and without leaving a child," and as that contingency had not taken place, he declared the next of kin were entitled as upon an intestacy.

CONTRACT — STATUTORY CONFIRMATION OF CONTRACT — CONTRACT TO GIVE 'FIRST REFUSAL' OF LAND—PURCHASER WITH NOTICE—INJUNCTION.

In *Manchester Ship Canal v. Manchester Race Course Co.* (1900) 2 Ch. 352, the plaintiffs had entered into an agreement with the Manchester Race Course Co. whereby, inter alia, it was agreed that whenever the lands used by the Race Course Co. as a race course should cease to be so used, or in case the lands should be at any time proposed to be used for dock purposes, then in either of such cases the Race Course Co. were to give the plaintiffs "the first refusal" of the lands. The agreement had been confirmed by statute. In October, 1899, the Race Course Co. offered to sell the

land in question to the plaintiffs for £350,000, and at the same time the Race Course Co. were also negotiating for a sale of the property to another company, but the price the company was willing to give was never communicated to the plaintiffs. On 6th November, 1899, the plaintiffs offered £200,000, which was refused, and on the same day the Race Course Co. arranged to sell the property for £280,000 to the Trafford Park Co., "subject to the rights of the Canal Co. under the agreement of March 7, 1893." The action was brought against both the vendors and purchasers, to restrain the carrying out of the sale as being a breach of the agreement with the plaintiffs. The defendants contended that the agreement was void for remoteness and uncertainty, but Farwell, J., held that the agreement, having received statutory confirmation, was not open to objection on that ground. He also held that a proposed user by any intending purchaser (including the plaintiffs) entitled the plaintiffs to a first refusal, and that the Race Course Co. could not sell the race course to third parties without first informing the plaintiffs of the actual cash price the intending purchaser was offering, and offering it to the plaintiffs at that price, and that such right of first refusal might be enforced against an intending purchaser with notice, on two grounds, viz., (1) because it was an interest in land, and (2) because so long as the matter rested in fieri, the Court, by an inverse application of the principle of *Wilmott v. Barber* (1880) 15 Ch. D. 96, could restrain the intending purchaser from accepting a conveyance of the legal estate in breach of the vendor's prior contract with the plaintiffs. He, therefore, granted an injunction restraining the Race Course Co. from selling the race course to any person or company without first offering it to the plaintiffs at the same cash price that the intending purchaser is offering; and also restraining the carrying out of the agreement with the Trafford Park Co. unless and until that had been done.

MERGER—LEASE AGREEMENT FOR LIFE ESTATE—INTENTION.

Ingle v. Vaughan Jenkins (1900) 2 Ch. 368, was an action to compel the specific performance of an agreement to grant a lease. The facts were a little peculiar. A tenant for life, under a strict settlement having power to grant a lease for 99 years, executed an informal instrument whereby he agreed to grant a lease to the second tenant for life, at a rent of £9 per annum, on his erecting a

house, which he shortly after erected at a cost of £1,500. The first tenant for life died, and the second tenant for life became legal tenant for life in possession of the settled estate. The lease was never actually granted. On the death of the second tenant for life the remainderman declined to recognize the right of the executor of the second tenant for life to a lease, on the ground that the benefit of the agreement for a lease or equitable term thereby created had become merged, or extinguished, in the legal life estate of the termor. Farwell, J., however, held that the principle applicable to the merger of charges in equity, applies also to the merger of leases, and the Court is guided by the intention, and, in the absence of evidence of any express intention, will be guided by a consideration of what would be most for the benefit of the person in whom the two estates became vested, and in the present case he held the presumption was clearly against any merger, and specific performance of the agreement was accordingly decreed.

INJUNCTION — NUISANCE — ADJOINING PREMISES — REASONABLE USE — ALTERATIONS.

Sanders-Clark v. Grosvenor Mansions Co. (1900) 2 Ch. 373, was an action by a lessee to restrain a nuisance by the lessee of adjoining premises. The plaintiff was a lessee of a flat, and the defendant D'Allessandri was lessee from the same landlords of the premises immediately underneath the plaintiff's flat, and carried on there the business of a restaurant. In order to do this he made certain alterations in his flat, put up a large cooking range in place of a small grate formerly in the kitchen, and substituted wire gauze for glass in a window. The flue was not properly constructed for the large range and caused undue heat and danger to the plaintiff's premises. The plaintiff complained that D'Allessandri conducted his premises so as to cause an intolerable nuisance to her by noise, heat, and smell, and brought an action for an injunction against him and also against their common landlords, but the action was discontinued as against the latter. Pending the action the defendant made alterations to remedy the defect in the flue. Buckley, J., who tried the action, held that the defendant by the alterations he had made in the premises, and the mode in which he carried on his business, had created a nuisance, and that the proper test was whether he was using his

premises reasonably or not, not merely whether for the purpose of carrying on a restaurant he was acting reasonably. Having regard to the nature of the premises he come to the conclusion that the defendant D'Allessandri was not using his premises reasonably, and that the plaintiff was entitled to an injunction.

CHARTER PARTY — CONTRACT — FULL AND COMPLETE CARGO — CARGO IN FROZEN CONDITION.

The Steamship Isis Co. v. Bahr (1900) A.C. 347, was an action brought by shipowners to recover for loss of freight. By a charter party, made in contemplation of a mid-winter loading, the defendants agreed to load at a port in the United States "a full and complete cargo of wet wood pulp which contains about 50 per cent. of water." The defendants loaded pulp of that description which was frozen. By reason of its frozen condition it occupied more space than it otherwise would, and it was consequently not possible to stow as large a quantity by 450 tons. Evidence was given that in winter wet pulp was usually loaded in a frozen condition, and the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, Morris, Shand and Brampton) agreed with the Court of Appeal that the obligation to load a full and complete cargo had been performed by loading as much pulp in a frozen condition as the ship would carry, and that the action was therefore properly dismissed.

WORKMEN'S COMPENSATION — DEATH OF CHILD—DEPENDENCY OF FATHER ON CHILD.

The Main Colliery Co. v. Davies (1900) A.C. 358, was a case arising under the Workmen's Compensation Act 1897 in which the father of a child who had been killed claimed to be entitled to compensation under the Act, and the question was whether the father could be said to have been dependent on the child. The evidence shewed that the deceased child's earnings had been handed by him to his father and used with the father's own earnings in support of the family. The House of Lords (Lord Halsbury, L.C., and Lords Morris, Davey, Shand and Brampton) held that the question of dependency is one of fact in each case, irrespective of the standard of living in the neighbourhood or the class to which the family belonged, and that the evidence in this case was sufficient to establish such dependency of the father upon the child.

ADMINISTRATION SUIT—FUND ORDERED TO BE CARRIED TO SEPARATE ACCOUNT
—ASSIGNMENT OF FUND—ASSIGNEE.

In *Edgar v. Plomley* (1900) A.C. 431, the Judicial Committee of the Privy Council (Lords Hobhouse, Morris and Davey, and Sir R. Couch), on appeal from the Supreme Court of New South Wales, decided that where in an administration suit a fund has been ordered to be carried over to a separate account, and after being so carried over, is specifically assigned for value to another without notice of any equitable claim by the other parties to the suit against the assignor, the assignee is entitled to hold the fund free from any such equitable claims; and mere notice that the assignor was trustee and defendant in a suit for an account, in which his fund might be made answerable, in case of default proved against the assignor, is not sufficient to affect the assignee.

DEED OF SEPARATION — HUSBAND AND WIFE — MISREPRESENTATIONS NOT
CREDITED—SETTING ASIDE DEED—COSTS—PAUPER.

Wasteney v. Wasteney (1900) A.C. 446, was an action by a husband to set aside a separation and annuity deed on the ground of fraudulent representations of the wife that she had not then committed adultery, and also on the ground of subsequent adultery by her. It appeared that at the time the deed was executed the husband disbelieved his wife's representations as to her chastity, and the deed contained no condition as to chastity. The Court of Appeal of New Zealand had affirmed a judgment in favour of the husband, but the Judicial Committee of the Privy Council (Lord Halsbury, L.C., and Lords Hobhouse, Macnaghten, Davey and Robertson) reversed the decision, holding that on neither ground could the plaintiff succeed. The wife having brought her appeal in forma pauperis, she was held entitled to such costs below as are payable in the colony in pauper appeals, and to such costs of appeal to the Privy Council as she would be entitled to under the rule of the House of Lords relating to pauper appeals which rule is adopted by the Privy Council.

ARBITRATION—AWARD—LUMP SUM AWARDED—EVIDENCE TAKEN ON MATTERS
NOT REFERRED—ARBITRATORS, JURISDICTION OF—SCOPE OF REFERENCE.

Falkingham v. Victorian Railway Commissioners (1900) A.C. 452, was an action on an award made by arbitrators appointed under a contract between the plaintiffs and defendants for the construction of a railway. A lump sum had been awarded in favour

of the plaintiffs, and the defendants pleaded that the sum included matters, claims, and demands, in respect of which the arbitrators had no jurisdiction, as being beyond the scope of the reference. They also counter claimed for damages for delays, not allowed in writing by their engineer in chief, and which claims the arbitrators had disallowed. In the Supreme Court of Victoria the claim of the plaintiffs had been dismissed, and the counterclaim of the defendants allowed. The Judicial Committee of the Privy Council (The Lord Chancellor, Lords Macnaghten, Davey and Robertson) came to the conclusion that the Colonial Court had erred in both points. The Court below had held the award bad, but the Privy Council held it to be valid and not open to objection, because it appeared that the matters actually referred were those mentioned in the submission, and it was no objection to the award that it did not state on its face that other matters not referred had been rejected from consideration; neither was it bad because the arbitrators had taken evidence on matters not referred, but not shewn to have been irrelevant to the inquiry, or to have been included in the sum awarded. With regard to the counterclaim the Privy Council found that by the contract, the refusal of the Chief Engineer to grant a certificate allowing delay, was to be subject to arbitration, and that under the submission a final award could be made without sending the matter back to the engineer, and it was therefore held that the award was valid as to the counterclaim which was accordingly disallowed.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Que.] GRAND TRUNK RAILWAY *v.* THERRIEN. [Oct. 8.]

Railways—Farm crossings—G. T. R. Co.—Interpretation of statute—Railway Act of Canada, s. 191—16 Vict. c. 37, s. 2—18 Vict. c. 33, s. 4—14 and 15 Vict. c. 51, c. 9, s. 16—Constitutional law—Jurisdiction of provincial legislature.

An owner whose lands adjoin a railway subject to the Railway Act of Canada, upon one side only, is not entitled to have a crossing over such railway under the provisions of that Act, and the special statutes in respect

to the Grand Trunk Railway of Canada do not impose any greater liability in respect to crossings than the Railway Act of Canada. *Gribble v. The Midland Railway Co.* (1895) 2 Chy. 827, and *The Canada Southern Railway v. Clouse*, 13 S.C.R. 140, referred to.

The provincial legislatures in Canada have no jurisdiction to make regulations in respect to crossings or the structural condition of the road-bed of a railway subject to the provisions of the Railway Act of Canada. *The Canadian Pacific Railway v. Parish of Notre Dame de Bonsecours* (1899) A.C. 367 followed. Appeal allowed with costs.

Stuart, Q.C., for appellant. *Fitzpatrick, Q.C.*, and *L. A. Taschereau*, for respondent.

Man.] CANADIAN PACIFIC R.W. CO. v. WINNIPEG. [Oct. 8.

Assessment and taxes—Exemption from taxation—School taxes—By-law—Validating statute—Construction.

In 1881 the City of Winnipeg passed a by-law, No. 148, providing for a bonus to the C.P.R. Co. in consideration of certain works to be undertaken by the company, and also providing that the company should be forever exempt from all "Municipal taxes and rates, levies and assessments of every nature and kind." In 1883 the Legislature of Manitoba passed an Act making valid by-law No. 148 of the City of Winnipeg, describing it as a by-law for a bonus, but omitting all reference to the exemption clause.

Held, affirming the judgment of the Court of Queen's Bench for Manitoba, 12 Man. L.R. 561, that the said statute made valid the whole by-law 148, that relating to exemption from taxes as well as the portion recited in the Act.

Held, also, reversing the said judgment, that under said by-law school taxes were included in the exemption from "All municipal taxes." Appeal allowed with costs.

Aylesworth, Q.C., and *Aikins, Q.C.*, for appellant. *Howell, Q.C.*, and *Chrysler, Q.C.*, for respondent.

Ont.] CITY OF OTTAWA v. HUNTER. [Oct. 24.

Appeals, Ontario—Amount in dispute—60 & 61 Vict. c. 34 (f).

Sec. 1 (f) of 60 & 61 Vict. c. 34, which provides that where an appeal from the Court of Appeal for Ontario depends on the amount in dispute, such amount shall be understood to be that demanded and not that recovered, if they are different, has no operation, being repugnant to sub-sec. (c) which requires the amount on the appeal to exceed \$1,000 to give jurisdiction.

Where two clauses of the same statute, coming into force at the same time are repugnant, the clause placed last in point of arrangement cannot

be held to supersede the other as expressing the latest mind of the legislators. Appeal quashed with costs.

Latchford, Q.C., for the motion. *McVeity*, contra.

Que.]

FRECHETTE v. SIMONEAU.

[Oct. 26.

Appeal—Jurisdiction—Amount in dispute—R.S.C. c. 135, s. 29 (b).

An action was brought by the lessee of lands the rental of which was \$250 per annum, to have the lease cancelled as being simulated.

Held, that no amount of \$2,000 or upwards was in dispute, and the appeal not relating to any title to land or tenements or annual rents within the meaning of sec. 29 (b) of R.S.O. c. 135, the Supreme Court has no jurisdiction to hear it. Appeal quashed with costs.

Pelletier, Q.C., for the motion. *Fitzpatrick*, Q.C., and *L. A. Tasche-reau*, contra.

N.S.]

HAMILTON v. GRANT.

[Oct. 8.

Company—Judgment creditor—Action against shareholder—Transfer of shares—Evidence.

Judgment creditors of an incorporated company being unable to realize anything on their judgment brought action against H. as a shareholder, in which they failed, from inability to prove that he was owner of any shares. They then brought action against G. in which evidence was given, not produced in the former case, that the shares once held by G. had been transferred to H. but were not registered in the company's books. On this evidence the court below gave judgment in favour of G.

Held, affirming such judgment, that the shares were duly transferred to H. though not registered, as it appeared that H. had acted for some time as president of, and executed documents for the company, and the only way he could have held shares entitling him to do so was by transfer from G.

Held also, that although there appeared to be a failure of justice from the result of the two actions, the inability of the plaintiffs to prove their case against H. in the first could not affect the rights of G. in the subsequent suit.

The company in which G. held stock was incorporated in 1886 and empowered to build a certain line of railway. In 1890 an Act was passed intituled "An Act to consolidate and amend" the former company, but authorizing additional works to be constructed, increasing the capital stock, appointing an entirely different set of directors, and giving the company larger powers. One clause repealed all Acts and parts of Acts inconsistent therewith. G. had transferred his shares before the latter Act came into force. The judgment against the company was recovered in 1895.

Held, that G. was never a shareholder of the company against whom such judgment was obtained. Appeal dismissed with costs.

Cahan, for appellants. *Newcombe*, Q.C., and *Mellish*, for respondents.

N.S.]

MICHAELS v. MICHAELS.

[Oct. 8.]

Husband and wife—Separate property of wife—Action by wife against husband—Married Woman's Property Acts N.S.

In 1882 the respondent, A. L. Michaels, made a promissory note for \$10,000 in favour of Jennie Levy, payable on demand. This note was endorsed by the payee to her sister, the maker's wife. In 1899 an action was brought on the note by the endorsee against her husband the maker, which at the trial was dismissed on the ground that the Married Woman's Property Act did not authorize such an action. On appeal to the court en banc, the judges were equally divided in opinion, and the judgment at the trial stood affirmed. The plaintiff then appealed to the Supreme Court of Canada.

By R.S.N.S. 5 ser., c. 94, a married woman in Nova Scotia holds her separate personal property, not reduced into possession by her husband, as if she were a feme sole, and the Act of 1898, c. 22, gives her the same civil remedies against every person, including her husband, as an unmarried woman has.

Held, reversing the judgment of the Supreme Court of Nova Scotia, that the note sued on was personal property of the wife not reduced into possession, and the action could be maintained under the above Acts by the wife against her husband. Appeal allowed with costs.

Borden, Q.C., for appellant. *Mellish*, for respondent.

EXCHEQUER COURT.

Burbidge, J.]

[June 28.]

GIBBONS v. THE QUEEN, ST. JOHN TERMINAL RY. CO., THIRD PARTY.

Expropriation—Compensation for leasehold interest.

The suppliants were lessees of certain land and premises expropriated for the Intercolonial Railway. The premises had been fitted up and were used by them, for the purposes of their business as coal merchants. By the terms of the lease under which they were in possession the term for which they held could at any time be determined by the lessors by giving six months' notice in writing, in which event the suppliants were to be paid two thousand five hundred dollars for the improvements they had made.

Held, that the measure of compensation to be paid to the suppliants

was the value at the time of the expropriation of their leasehold interest in the lands and premises.

Apart from the sum payable for improvements there was no direct evidence to shew what the value was. But it appeared that the suppliants had procured other premises in which to carry on their business, and that in doing so they had of necessity been at some loss, and that the cost of carrying on their business had been increased. The amount of the loss and of increased cost of carrying on business during the six months succeeding the expropriation proceedings was in addition to the sum mentioned taken to represent the value to them or to any person in a like position of their interest in the premises.

The suppliants also contended that if they had not been disturbed in possession they would have increased their business, and so have made additional profits, and they claimed compensation for the loss of such profits.

Held, that this claim could not be allowed.

A. P. Barnhill, for suppliants. *H. A. McKeown*, for respondent.
A. A. Stockton, Q.C., for third party.

Province of Ontario.

COURT OF APPEAL.

From Boyd, C.] PEDLOW v. TOWN OF RENFREW. [Oct. 11.

Way—Highway—Plan—Dedication—Municipal corporations.

The owners of two adjoining lots agreed between themselves to give twenty feet of each lot to form a street, and a plan of sub-division of the lots shewing a street of this width was filed by them, the consent of the municipality being given by resolution. The line fence was then taken down, and one owner fenced his land so as to leave twenty feet of the lot open to the public, but the other fenced his so as to leave forty feet. Without any by-law or further resolution the municipality did some grading on the sixty feet and the sixty feet were used by the public for the purpose of a highway.

Held, that the giving of forty feet by the one owner did not relieve the other owner from his obligation to give twenty feet, and that he could not, after the expenditure of public money upon it and its user by the public retract the dedication of the twenty foot strip. Judgment of BOYD, C., 31 O.R. 499, ante p. 159, affirmed.

Aylesworth, Q.C., and *T. W. McGarry*, for appellant. *S. H. Blake*, Q.C., for respondents.

HIGH COURT OF JUSTICE.

Master in Chambers.] HALL v. BOWERMAN.

[July 5.]

Interpleader—Writ of possession—Interference with execution—Claim to land.

Upon an attempt to execute a writ of possession under a judgment against G., who was in actual possession, the sheriff was served with a notice by B. claiming the land mentioned in the writ, and informed the sheriff that the house standing thereon was locked and that he (B.) had the key. B.'s claim was as mortgagee upon default in payment of interest.

Semble, that the sheriff's duty, as soon as he received the writ, was to break open the door and give the plaintiff possession. But

Held, that, as the sheriff was not bound to consider the legality of the claim put forward, he was entitled to an interpleader order.

R. J. MacLennan, for sheriff. E. D. Armour, Q.C., for plaintiff. G. W. Holmes, for defendant.

Street, J.]

IN RE HOPKINS' ESTATE.

[Oct. 11.]

Devolution of Estates Act—Payment of debts—Distinction between real and personal property—R.S.O. c. 127.

The Devolution of Estates Act, R.S.O. c. 127, vests the real as well as the personal estates of a deceased person in his personal representatives for the purpose of paying his debts; but, except in the case of a residuary devise of real and personal estate, which is especially provided for by section 7, the order in which the different classes of property were applicable to the payment of debts before the passing of the Act, has not been disturbed by its provisions.

W. M. Douglas, Q.C., for executors. Gibbons, Q.C., Ferguson, and Middleton, for other parties.

Ferguson, J.]

REGINA v. RANDOLPH.

[Oct. 31.]

Criminal law—Theft—Summary trial—Excessive penalty—Amendment—Discharge—Further detention—Criminal Code, ss. 752, 783, 787, 800.

The defendant was prosecuted for stealing \$5 in money, the property of one J. M., contrary to the form of the statute, etc., and the charge was heard and determined in a summary way by a police magistrate.

Held, that the prosecution fell under s. 783 (a) of the Criminal Code, the value of the property being less than \$10, and it not being charged that the offence was "stealing from the person;" and, therefore, s. 787 applied,

and the magistrate had no power to impose a penalty of imprisonment for longer than six months.

The provisions of the Code respecting amendments to summary convictions do not apply to summary trials; and the provisions of s. 800 do not apply where the same infirmity is found in the conviction as in the commitment.

The conviction and commitment were bad for imposing an unauthorized penalty; the defendant was entitled to be discharged upon habeas corpus; and an order should not be made under s. 752 for his further detention.

Du Vernet, for defendant. *J. R. Cartwright*, Q.C., and *J. W. Curry*, Q.C., for the Crown.

Boyd, C.]

IN RE SOLICITORS.

[Nov. 2.

Solicitor—Bills of costs—Taxation—Payment—Connected charges—Agreement—Unsigned bills—Delay—Overcharges.

A firm of solicitors for about eight years acted for an estate in the collection of moneys and realization of securities relating to a block of land sold by the testator. During this period the solicitors from time to time rendered statements of account to the executors and paid them cheques for balances in their hands as shewn by such statements, and also rendered detailed bills of their costs for their services, in respect of different actions and proceedings taken, though not in all cases, such bills being paid by the retention by the solicitors, without objection on the part of the executors, of part of the moneys collected. Two or three of the larger bills were moderated by a taxing officer shortly after they were rendered. Upon an application by executors for taxation of all the bills after the eight years,

Held, that this could not be regarded as one continuous dealing keeping the right to tax in suspense till the collection or exhaustion of all the securities.

Held, also, that there was no agreement between the solicitors that the right to tax generally should remain open to the executors.

As to certain of the bills of costs said not to have been actually signed by the solicitors,

Held, that they were substantially sufficient, and, after being paid out of the funds collected, with the knowledge and sanction of the executors, they could not be treated as open to taxation, after years of delay and no specific overcharges being indicated.

In re Sutton and Elliott, 11 Q.B.D. 377, followed.

J. H. Moss, for executors. *W. E. Middleton*, for solicitors.

Meredith, C.J., MacMahon, J.]

[Nov. 12.]

JONES v. TOWNSHIP OF STEPHENSON.

Municipal corporations—Damages—Non-repair of highway—Notice of accident—Joint liability—Waiver.

Notice of an accident and the cause thereof required by R.S.O. c. 223, s. 606 (3), must now, by 62 Vict. c. 25, s. 39, be given to each of the municipalities where the claim is against two or more as jointly responsible for the repair of the road. *Leizert v. Township of Matilda*, 26 A.R. 1, not now applicable. Where notice in writing was given to one township municipality of two sued as jointly liable, but not to the other, it appeared that the reeve of the latter had been verbally notified by the plaintiff and had then promised to write and had written to the reeve of the former, after which both reeves attended with the plaintiff and examined the place of the accident, and the reeve of the latter afterwards wrote to the plaintiff advising him that the township corporation did not recognize his claim because it was considered that the loss arose from the fault of the plaintiff, and all this within thirty days after the accident.

Held, that there was no waiver.

Lindsey, Q.C., for plaintiff. *Du Vernet* and *A. A. Mahaffy*, for defendant.

SECOND DIVISION COURT, COUNTY OF PERTH.

McLAREN v. MILLER.

Promissory note—Material alteration—Correction of error after issuing of note—Bills of Exchange Act, 1890, s. 63.

A promissory note was drawn up and signed on January 1st, 1896, payable "twelve months after date." The payee, who drew the note, used an old form with the figures "188—" printed in the place for the date. When drawing the note, the payee added the figure "6," thus making the date read January 1st, 1886, instead of 1896. Some time after the issue of the note, the payee discovered the mistake and corrected it by writing a figure "9" over the last "8," without asking or obtaining the consent of the makers.

Held, that this was not a "material alteration" within the meaning of "The Bills of Exchange Act, 1890," s. 63, but being only the correction of an error, making the contract appear what it was originally intended to be, did not invalidate the note.

[Stratford, Sept. 15. BARRON, CO. J.]

Action on a promissory note made by one Albert Cameron and the defendant in favour of one George Guest Wilson or bearer for \$50, dated "Staffa, Jan. 1st, 1896," payable twelve months after date, and which note was transferred by Wilson to the plaintiff.

The defence was that the date was altered. The note when signed had the date "January 1st, 1886," but it was not signed upon that day. It was

in fact signed on the 1st of January, 1896. A form of note was used which had the figures printed of "188—." When the note was filled up ready for signature the figure "6" alone was added, making the note read as of the year "1886," it not being noticed at the time that the preceding figure was "8" instead of "9." Some time after the note was signed, the payee altered the figures by inserting over the second "8" the figure "9," thus making the year "1896," which was the true year, instead of 1886 which was not only not the true year, but, under the circumstances in evidence an impossible year for the note to have been signed. It was not argued that the note was signed by Miller on any other day than the "1st January, 1896;" but it was said that, being signed as of January 1st, 1886, such is the date of the note, so that, when the note was so signed, it was a contract to pay twelve months after the 1st January, 1886, and that, though, by this, the note when signed in fact was due, such was the contract in writing, and if then altered the alteration was material and the note thereby became void.

F. W. Thomson, for the plaintiff. *Mabee, Q.C.*, for defendant.

BARRON, Co. J.—The Bills of Exchange Act, s. 63, enacts that where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is voided. The defendant's assent was never obtained, so that the question remains: Is the alteration in this case a "material alteration"? The above section except as to the proviso, is not new law, the statute is simply an adoption or codification of what was theretofore existing law: *Vana v. Lowther*, 1 Ex. D. (1876), 176; *Beltz v. Molson's Bank*, 40 U.C.R. 253; *Boulton v. Langmuir*, 24 O.A.R. 618. The alteration of the date of a note was always held to be material, and the Act has made no change in this respect. Hence the authorities governing the condition of the law before the passing of the Act are applicable to the same condition of law since the passing of the Act.

The date of a note or document is its true date, not a false or impossible date. So, when a date is altered to be material it must be the true date, not a false or impossible date. This, I take it, is understood all through the cases wherein it is held that the alteration of the date is material. For example, in *Boulton v. Langmuir* it was held that the changing by the payee of the date of a demand note to a later date was a material alteration and made the note void; but in that case it was the true date that was altered. MR. JUSTICE OSLER says (p. 625): "To alter the date of the note was to make it appear to be a different contract . . . from that which the defendant had entered into." But, in the case in question, to alter the date was to make it appear to be the exact contract the defendant had entered into and not a different one, because the note was, in fact, signed on the 1st January, 1896, and not on the 1st January, 1886.

There are said to be two cases in which an alteration, though in a material part, will not vacate an instrument. One of these cases is where the note is altered to correct a mistake, or supply an omission, and in furtherance of the original intention of the parties. The original intention

of the parties was not to make an impossible contract, for that is what the contract is, if the date had not been corrected. How is it possible on the 1st January, 1896, to contract to do a thing twelve months after the 1st day of January, 1886. Therefore the date, as it was before the alteration, was an impossible date. It might be entirely different if the time for performance had been subsequent to the 1st day of January, 1896, starting to run from the 1st of January, 1886; but that is not this case. This case is one of correcting an accidental mistake so as to make the contract that which it was intended to be according to the original intention of the parties. No one is injured, and no one is benefitted, though that is not altogether the test of the materiality of an alteration (*Boulton v. Langmuir*, supra, at page 627) but it is a help in ascertaining what the real contract between the parties actually is. The rule relating to the alteration of deeds, as laid down in *Pigot's case*, 11 Rep. 266, and *Master v. Miller*, 1 Sm. L.C. 796 decides that this rule is applicable to promissory notes. Subsequent cases have applied the rule indiscriminately to all written instruments whether under seal or not (*Davidson v. Cooper*, 11 M. & W. 778; 31 M. & W. 343), and it is a most wholesome rule and in keeping with good conscience and equity, that when a contract is so altered as to make it just what the contractor intended it should be, that he should not be discharged from the very contract he actually did make, by reason of such alteration. LUSH, J., (in *Aldous v. Cornwell*, L.R. 3 Q.B., a case most fitting to the present one) said: "It seems to us repugnant to justice and common sense to hold that the maker of a promissory note is discharged from his obligation to pay it because the holder has put in writing on the note what the law would have supplied if the words had not been written." See also *Fitch v. Kelly*, 44 U.C.R. 578; *Merchants' Bank v. Stirling*, 1 Russ. & Geld. (N.S.) 439.

It is contended that an alteration can only be effected through the aid of the courts; that the instrument could only be reformed on an application to the proper court. That remedy, of course, was open to the plaintiff, and it appears that some courts in the United States insist on this course from prudent motives, deeming it an element of risk which might lead to grave results to permit corrections to be made or omissions supplied by interested parties. But there are numberless authorities the other way, both in the United States and in England, proceeding on the view that, if the alteration is in furtherance of the intention of the parties, then the assent of the party to be charged is implied and the alteration even though it is in a material respect will not vitiate the instrument. (*Chitty on Bills* 184. *London etc. Bank v. Roberts*, 22 W.R. 402.) "So it has been held that the alteration of the date of a note, made by the promisee, without the knowledge or consent of the promisor, merely to correct a mistake and make the note such as both parties intended that it should be, does not invalidate the instrument;" Am. & Eng. Encl. of Law, 2nd ed., vol. 2, p 211. The judgment will therefore be for the plaintiff.

Province of Nova Scotia.

SUPREME COURT.

Full Court.]

MILLER v. ARCHIBALD.

[March 13.

Practice and procedure—Plea of payment into court—Application after expiry of time for leave to reply accepting amount—Should be allowed on terms—Questions affecting costs only, discretion of Chambers judge as to.

Plaintiff, as executrix of E.M., brought an action against defendant, claiming \$300 damages for an alleged unlawful detention of the plaintiff's goods.

Defendant pleaded a number of defences, and paid into court the sum of \$1, which he said was sufficient to satisfy plaintiff's claim.

A motion was made on behalf of plaintiff at Chambers for an order that, notwithstanding the time limited for so doing had expired, plaintiff be at liberty within five days, or such other time as should be ordered, to file and deliver a reply accepting the sum of money paid into court by defendant, and that the time for payment of said sum of money out of court be enlarged accordingly.

The application was refused with costs, on the ground that, although there was a technical right on the part of plaintiff to recover nominal damages, the action should not have been commenced for the value of the property, and, for this reason, plaintiff should be refused assistance over the technical difficulty which stood in her way on account of her not having replied within the ordinary time.

Held, allowing plaintiff's appeal, that in case of a plea of payment of money into court to satisfy the claim of the plaintiff, whenever the plaintiff becomes ready to accept such sum, his right to amend so as to accept the sum paid in in full must be allowed, subject to such terms as the law requires.

Per MEAGHER, J., dissenting. As the amendment sought did not go to the merits of any question to be tried, but affected the right to costs merely, the Chambers judge had a discretion to grant or refuse the indulgence asked.

R. L. Borden, Q.C., for appellant. *R. E. Harris*, Q.C., and *L. M. Johnstone*, for respondent.

Full Court.]

PARKER v. ETTER.

[March 13.

Magistrate—Action against, claiming damages for alleged wrongful arrest and imprisonment—Motion to set aside findings and judgment for defendant refused with costs—Mere irregularity where magistrate has jurisdiction over subject matter and person—English cases distinguished.

In an action brought by plaintiff claiming damages for alleged wrongful

arrest and imprisonment, it appeared that plaintiff was arrested and conveyed to jail upon a warrant issued by defendant, a justice of peace for the County of Hants, for the collection of the sum of \$4.20, being three years' poll tax at \$1 for each year, and an amount due for costs incurred on a general distress warrant previously issued by defendant for the collection of the taxes, to which a return had been made by the constable that he was unable to find any goods whereon to levy. It further appeared that before he issued the warrant under which plaintiff was arrested defendant had before him the affidavit of the secretary of school trustees for the district in which plaintiff resided, shewing that he had not paid his tax for three years, and that the trustees had authorized the secretary to collect the amount.

The evidence on the trial shewed that plaintiff was a defaulter in respect of his poll tax, and that a demand had been made upon him for payment in each of the three years for which the tax was claimed, and that on each occasion he had refused to pay. The jury found, in answer to questions submitted, that defendant acted in perfect good faith in all that he did, and in the belief that all he did was authorized by the statute, and that he was required by the statute to do what he did, and the learned trial judge thereupon directed judgment to be entered for defendant.

Held, refusing with costs a motion to set aside the findings and the judgment entered upon them, that defendant, having jurisdiction over the subject matter brought before him, and over the person of plaintiff in respect thereto, was not liable in trespass, either by reason of his having issued the warrant for arrest without proof of a previous demand made upon plaintiff for payment of his tax, or by reason of a departure from the prescribed form of warrant.

2. The defendant did not do any act which he had not power and jurisdiction to do upon a proper case; the most that could be said being, that he proceeded in an irregular way.

3. Excess of jurisdiction does not extend to a mere irregularity or erroneous judgment, but to a case where the justice does an act which he has no jurisdiction to do.

4. Under the Nova Scotia Statutes the duty of enquiring into the validity of the rate is not imposed upon the justice, and that the English cases, where the justices had jurisdiction to levy rates "well assessed," are therefore distinguishable.

5. Defendant's entry upon the enquiry was clearly within his duty and his jurisdiction.

F. T. Congdon, for appellant. *W. E. Roscoe*, Q.C., for respondent.

Full Court.]

ORDWAY v. LEBLANC.

[March 13.

Practice and procedure—Order for security for costs—Power of judge to extend time for giving, after expiry of time limited in order—Mistake of solicitor.

An order for security of costs contained in the following provision :
“ That in case default is made in giving security within the time aforesaid, this action be dismissed with costs.”

Held, reversing with costs the judgment of the learned County Court Judge for District No. 1, that notwithstanding the expiry of the time limited in the order, the learned judge had jurisdiction to entertain an application on behalf of plaintiff to enlarge the time to enable him to comply with the order, on the ground that it was by reason of a mistake on the part of plaintiff's solicitor that security was not given in time.

F. H. Mathers, for appellant. *H. S. Blackadar*, for respondent.

Ritchie, J., in Chambers.]

[Oct. 17.

IN RE DODGE & DENNISON CO.

Insolvent Act, c. 11, stat. of N.S., 1898—Action in name of official assignee.

Application by Messrs. A. W. S. & Co., B. B. & Co., Wm. R. & Co., and W. B. A. & Co., as creditors of said Dodge & Dennison Co., Ltd., to be authorized to take proceedings in the name of the official assignee at their own expense and risk, to recover the proceeds of certain moneys from Messrs. J. T. & Co., which were paid over to them by the said Dodge & Dennison Co., Ltd., within a few days of the assignment of the latter company to E. B. C., official assignee, or to recover certain goods or proceeds thereof which were unlawfully delivered to said J. T. & Co., or their agents, a few days before said assignment, contrary to s. 2 of above-named Act, upon such terms and conditions as to indemnity as shall be adjudged reasonable.

Held, that applicants were entitled to an order authorizing them to bring such action in the name of the official assignee for their benefit within the terms of s. 9 of the Act on indemnifying said assignee from all claims.

Held, further, that the fertilizing company, who intervened, were entitled to join with the other creditors, and share pro rata in the benefits that might result from the action if they contributed to the expenses and became parties to the indemnity to the assignee. Any question as to the security to be given to assignee to be referred to a judge to settle.

R. E. Harris, Q.C., and *J. A. Chisholm*, for applicants. *E. B. Cogswell*, assignee, in person, contra.

QUEEN v. QUINN, ante, p. 644, should be cited as “ *Queen v. Brine*.”

Province of British Columbia.

SUPREME COURT.

Full Court.]

GORDON v. CITY OF VICTORIA.

[June 30.

Interest on judgment entered by Full Court in accordance with verdict, reversing trial judge—When computed from—57 and 58 Vict., s. 3 c. 22.

Appeal by the defendant from an order of WALKEM J., allowing the plaintiff to issue execution for interest at six per cent. on the sum of \$10,000.00 from 19th May, 1897, to 12th April, 1900. On 19th May, 1897, the plaintiff obtained a verdict for \$10,000.00 damages, but the trial judge dismissed the action. The plaintiff appealed and the Full Court allowed the appeal on 29th November, 1899, and ordered judgment to be entered in plaintiff's favour for the amount of the verdict. The defendant on the 12th April, 1900, paid the plaintiff the amount of the verdict and agreed to pay interest from the date of the Full Court order to date of payment; but the plaintiff claimed interest from the date of the verdict and took out a summons for liberty to issue execution for the amount, and WALKEM, J., granted the application, whereupon the defendant appealed to the Full Court.

Held, that plaintiff was entitled to interest from the date of the verdict.

A. D. Taylor, for appellant. *Wilson, Q.C.*, for respondent.

Drake, J.]

ALASKA STEAMSHIP CO. v. MACAULAY.

[Sept. 15.

Security for costs—Foreign company carrying on business in British Columbia—R.S.B.C. 1897, c. 44, s. 144.

Summons for security of costs from the plaintiff, a company incorporated in the State of Washington and having its head office in Seattle. The company owned a steamer running between Seattle and Victoria, had an office in Victoria managed by a freight and passenger agent who devoted his whole time to the business of the company in Victoria, and who was paid a salary by the company. Rent and all office expenses were paid by the company, which was not licensed or registered in British Columbia.

Held, that the company was a foreign company within the meaning of s. 144 of the Companies Act, and was bound to give security for costs. *La Bourgogne* (1899), P. 1, and (1899), A.C. 431, considered.

O'Brien (Cassidy), for defendant. *J. H. Lawson, Jr.*, contra.

Book Reviews.

A Treatise on Electric Law, covering the law governing all electric corporations, uses and appliances, and all relative public and private rights, by JOSEPH A. JOYCE (author of *Joyce on Insurance*) and HOWARD C. JOYCE: New York: The Banks Law Publishing Company, 21 Murray Street, 1900. Price \$7.25.

This is a book of nearly 1200 pages, and is a full summary of the law affecting the important subject therein treated of. Though we are as ignorant as ever of what electricity is, we are beginning to find out some of the uses to which it can be applied and how to harness it. In the past few years its use has been fruitful of much litigation, and much law has grown up around it. A thorough investigation of these many and ever increasing authorities has rendered necessary something more than a reference text book; and now we have before us a treatise dealing with the various new and important questions which have arisen in Anglo-Saxon communities in a comprehensive and thorough manner. So far as our examination goes the book before us "fills the bill." The decisions seem to have been examined with great care and the application of old principles to this new and growing branch of the law successfully accomplished. We notice that the authors refer to the Canadian as well as English cases; thus making the book almost as useful to the profession in the Greater Britain as it is to those in the United States.

The large and helpful scope of this work may be gathered from some of its chapters. The Nature and character of electric companies; Constitutional and legislative control, this of course referring only to the United States, and is only of interest so far as the legislation is similar; Municipal lighting; Eminent domain; Abutting owners; Construction of lines, their maintenance and management; Duties and liabilities of companies dealing with electricity in their various uses; Interference of wires; Passengers on electric railways; The use of streets, and crossing railway tracks; Employees, their duties and liabilities; Duties and liabilities of telegraph and telephone companies; Connecting and competing telegraph lines; Telegrams as to sickness, death, etc.; Contracts by telegraph; Taxation of electric companies; Damages and measure of damages; Parties, remedies and evidence, etc. On the whole a very valuable work, which will be largely used both by the profession and by electric corporations, who should possess this work also as it covers matters with which they should be constantly conversant.

Flotsam and Jetsam.

UNITED STATES DECISIONS.

INSURANCE:—The right to insurance on property destroyed by fire after an oral contract to insure, but before issuance of a policy, is held, in *Hicks v. British America Assurance Co.* (N.Y.), 48 L.R.A. 424, to be subject to the provisions and conditions of the standard policy prescribed by law, including that as to furnishing proofs of loss within a specified time.

COMPANY LAW.—The right of a stockholder to inspect books of the corporation is held, in *Cincinnati Volksblatt Co. v. Hoffmeister* (Ohio), 48 L.R.A. 732, not to depend upon the motive or purpose of the stockholder.

NEGLIGENCE.—The lack of barriers on the side of approaches to a bridge are held, in *Bell v. Wayne* (Wash.), 48 L.R.A. 644, not sufficient to make a municipality liable for injuries in case a team goes off the bank, when the roadway was wide enough for two teams to pass without difficulty and the fright of a horse was the proximate cause of the accident.

A charge to the jury that a master should instruct his employee as to the nature, force, and probable effect of the explosion of a pot of molten metal in case it comes in contact with water, and that it is not sufficient merely to instruct that an explosion is likely to follow such contact, is upheld in *Ribich v. Lake Superior Smelting Co.* (Mich.), 48 L.R.A. 649.

Whether or not an employee acts properly in obeying an order of a foreman to take bottles to an upper floor by the use of an elevator is held, in *Dallemand v. Saalfeldt* (Ill.), 48 L.R.A. 753, to be a question for the jury. A note to this case presents the authorities on a servant's right of action for injuries received in obeying a direct command.

The mere fact that an employee thinks an act is unsafe is held, in *McKee v. Tourtellotte* (Mass.), 48 L. R. A. 542, insufficient to render him guilty of negligence in performing it, if the employer assures him that there is no danger. With this case is a note on the effect of an assurance of safety given by the master or a co-servant.

The Living Age: Boston.—The *Living Age* will begin in its issue for Nov. 17, and will continue for several successive numbers, a thrilling account of "The Siege of the Legations," written by Dr. Morrison, correspondent of *The London Times* at Peking. This narrative is of absorbing interest in its descriptions of the daily life of the besieged legationers, and it is noteworthy also as containing some disclosures relating to the inside history of what went on at Peking in those stirring days, which are altogether new and of the utmost importance.

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One of our County Court judges in a judgment reported in a recent issue (p. 642) alludes to a matter which it would be well for Justices of the Peace to take note of, remembering that the position they hold is an honourable one, and one which should be held as a public trust, and not as is too often the case, as a means whereby to eke out a living by charging excessive and illegal fees. Those who have had conferred upon them the powers which justices possess should remember that it is their duty to make the law respected and that to that end they must be scrupulous in respecting it themselves. There should be no attempt by bargain or otherwise to obtain fees the right to which is not clear. If in doubt a justice should not give the benefit of the doubt to himself, but to the other side. Anything derogatory to the dignity of the position or unbecoming in the conduct of magistrates should at once be brought to the attention of those in charge of the administration of the laws.

The position of Clerk of the County Court of the County of York is still vacant. That it should be filled by a professional man goes without saying. Naturally it has to do with the practice of the Court, and the occupant of the position should of course be familiar with that practice. The late Clerk was a layman, and, *de mortuis nil nisi bonum*. There was much merriment, however, when a baker was appointed Surrogate Registrar of the County of York, and an auctioneer put in charge of the Registry Office of West Toronto; but then they were prominent politicians and had, we presume, to be provided for. That legal men should conduct the business of legal offices would seem not to require proof; and, if the members of the profession were to pull together and insist upon their rights, and if they had a representative body to look after their interests, the Government would doubtless see the propriety of paying attention to their reasonable demands. The country does not want a "corpse" or a figure-head, either as a Judge or as a Clerk of a Court.

UNDUE INFLUENCE.

"The relation of husband and wife is not one of those relations to which the doctrine of *Huguenin v. Baseley* applies." (a)

In view of the fact that a different doctrine has been adopted in Ontario a short review of the state of the law in England will, perhaps, demonstrate that the judgment in *Barron v. Willis* lays down a proposition that is not borne out by the cases, and is quite at variance with the trend of judicial opinion not only in England, but in the United States and Canada.

The doctrine of *Huguenin v. Baseley*, shortly stated, is, that, in the case of peculiar, confidential, or fiduciary relations between the parties, where influence is acquired and abused or confidence is reposed and betrayed, equity will give relief by taking away any advantage which has been acquired by such undue influence. The principle is independent of any admixture of imposition, being based upon a motive of general public policy. It is asserted in *Barron v. Willis* that the doctrine does not apply to the relation of husband and wife.

As early as *Milnes v. Rusk* (b) Lord Chancellor Loughborough stated that the relation between husband and wife was well compared to the case of parent and child, and he points, as an evidence of the court's solicitude for the protection of the wife, to the fact that, when it was sought to establish a deed between husband and wife upon her separate estate it was necessary to produce the wife in court, the reason being, no doubt, that the court might satisfy itself by enquiry as to whether undue influence had been exercised by the husband over the wife. And it was laid down that the rule that a feme covert is to be considered as feme sole, as to her separate property, did not extend to transactions with her husband.

The principle upon which the court acts is lucidly stated by Sir John Romilly, M. R., in *Cooke v. Lamothe* (c) (decided a year before the decision in *Nedby v. Nedby* which forms the basis for *Barron v. Willis*), as follows :

(a) Per Cozens-Hardy, J., in *Baron v. Willis*, (1899) 2 Ch. 578; reversed on a question of fact (1900) 2 Ch. 121.

(b) (1794) 2 Ves. Jun. 488-498.

(c) (1851) 15 Beav. at p. 240. See, also, *Hoghton v. Hoghton*, 15 Beav. 298.

"When those relations exist by means of which a person is able to exercise a dominion over another, the court will annul a transaction under which a person possessing that power takes a benefit, unless he can shew that the transaction was a righteous one That relation exists in every case in which two persons are so situated that one may obtain considerable influence over the other. The rule of the court, however, is *not* confined to such cases. Lord Cottenham considered that it extended to every case in which a person obtains by donation a benefit from another to the prejudice of that other person, and to his own advantage; and that it is essential in every such case, if the transaction should be afterwards questioned, that he should prove that the donor voluntarily and deliberately performed the act, knowing its nature and effect."

In *Billage v. Souther*, (d) Vice-Chancellor Turner says: "The jurisdiction is founded on the principle of correcting abuses of confidence, and I shall have no hesitation in saying it ought to be applied whatever may be the nature of the confidence reposed, or the relation of the parties between whom it has subsisted. I take the principle to be one of universal application, and the cases in which the jurisdiction has been exercised . . . to be merely instances of the application of the principle."

Smith v. Hay (e) determined that the principle applied to "every case where influence is acquired and abused or where confidence is reposed and betrayed."

In the cases the relations that are most frequently mentioned are those of solicitor and client, parent and child, trustee and cestui que trust, and guardian and ward, but, as stated by the Master of the Rolls (f), the rule is not confined to those cases; the reason of the relation of husband and wife not being referred to oftener being, no doubt, on account of the merger, at common law, of the existence of the wife in the husband.

In *Corbett v. Brock* (g), which was the case of an engaged couple, Sir John Romilly said: "I fully adhere to what I expressed in the cases of *Cooke v. Lamothe* and *Hoghton v. Hoghton*. If this were

(d) (1852) 9 Hare at p. 540.

(e) (1859) 7 H. L. C. 751.

(f) Sir John Romilly, in *Cooke v. Lamothe*, *supra*.

(g) (1855) 20 Beav. 524.

between husband and wife, I should require him to prove all the requisites I have pointed out in those cases as necessary to give validity to the transaction."

Where a widower married the sister of his deceased wife it was held that the relation thus constituted imposed upon the widower, claiming the benefit of a settlement made on him by his wife's sister, the onus of shewing that, at the time of entering into the transaction, she was fully, fairly and truly informed of its character and of her legal status (*h*).

If the rule is enforced in the case of a purely tentative arrangement, such as an engagement, it would seem to apply, a fortiori, where the parties have entered into an indissoluble union, such as marriage. The common law was so fully alive to the influence of the husband over the wife that, where she committed a felony in the presence of her husband, she was presumed to act under his coercion, and the onus was on the Crown to prove that she acted independently (*i*). This presumption was so strong, that, in Canada, it required a statutory enactment to dispose of it (*j*). There seems no good reason to dispute that motives and opportunities for the exercise of undue influence are as available between husband and wife as between guardian and ward or any of the other fiduciary relationships known to the law.

The learned judge who delivered the judgment in *Barron v. Willis*, says (*k*) that the text-writers are opposed to his view; but the opposition is not confined to them. In *Parfitt v. Lawless* (*l*), Lord Penzance expressly includes the relation of husband and wife in the same category as guardian and ward, etc. His words are: "In equity persons standing in certain relations to one another—such as parent and child, *man and wife*, doctor and patient, attorney and client, confessor and penitent, guardian and ward—are subject to certain presumptions when transactions between them are brought in question; and if a gift or contract made in favour of him who holds the position of influence is impeached by him who is subject to the influence, the courts of equity cast

(*h*) (1860) *Coulson v. Allison*, 2 DeG. F & J. 521.

(*i*) *Queen v. Torpy*, 12 Cox C. C. 45.

(*j*) Criminal Code, s. 13.

(*k*) At p. 585.

(*l*) (1872) L. R. 2 P. & D. 462, at p. 468.

upon the former the burden of proving that the transaction was fairly conducted as if between strangers; that the weaker was not unduly impressed by the influence of the stronger, or the inexperienced overreached by him of more mature intelligence."

In the United States the same opinion is held. The cases there determine that "No relation known to the law affords so great an opportunity for the exercise of undue influence as that existing between husband and wife . . . Under the head of actual undue influence, it may be said that it is always competent to shew the relation of the parties and the surrounding circumstances, and that in case the contracting parties sustain to each other the relation of husband and wife, and the agreement is such as to operate to the advantage of the former, equity will most closely scrutinize the transaction, and will set it aside upon evidence which might be insufficient were the parties in no confidential relation to each other. This principle is independent of any presumption, and is universally recognized. Nearly all courts, however, go further than this, and bring the matter in line with the decisions as to agreements between other parties to fiduciary relationship, viz.: that a presumption of undue influence exerted by the husband arises which is rebuttable by proof of the fairness of the transaction, full understanding and free agency on the part of the wife, and that there was no fraud, concealment, or imposition on the part of the husband" (m).

In *Barron v. Willis* the court based its opinion upon *Nedby v. Nedby* (n), which was the case of an appointment by the wife to the husband, and the onus was held to be on the wife, the decision being founded upon a deduction from the words of Lord Hardwicke in *Grigby v. Cox* (o). In the case last cited Lord Hardwicke, after stating that, where anything is settled to the wife's separate use, she is considered as a feme sole, and may appoint in what manner she pleases, says: "And this will hold though the act done by the wife is *in some degree* a transaction along with the husband." The real contest was between the wife and a stranger, the husband being interested only because of a declaration by the wife that the plaintiff had colluded with her husband. It is quite clear from

(m) Am. and Eng. Ency. of Law, Vol. 27, pp. 480, 481 and 482.

(n) (1852) 5 DeG. & Sm. 377.

(o) (1750) 1 Ves. Sen. 517.

a perusal of the case that the learned judge was concerned chiefly with the question between the wife and the stranger, but, notwithstanding this, Parker, V.-C., in *Nedby v. Nedby*, extended the decision to the case where the transaction was *entirely* between husband and wife, in cases of appointment, and *Barron v. Willis* has swept away the last qualification and lays down the broad proposition that the doctrine of *Huguenin v. Baseley* does not apply to the relation of husband wife. The decision may, therefore, be said to be one of first impression. It is a matter not devoid of importance that considerable doubt is thrown upon the relation of facts in *Grigby v. Cox* by Lord Thurlow, who says the defect in that case is that it does not state the trust (p).

With the well-accepted doctrine of *Huguenin v. Baseley* (q) before it, and the remarks of Sir John Romilly in *Cooke v. Lamothe*, decided only a year before, still in its ears, it is not unreasonable to suppose that the court in *Nedby v. Nedby* must have had before it some element other than those mentioned in the report that made it inequitable in that particular instance to apply the principle of *Huguenin v. Baseley*. *Cooke v. Lamothe* was not cited, and it may be that the court was acting upon a restricted idea of the principle, a restriction which, as appears from *Cooke v. Lamothe*, did not exist. If neither of these suppositions be correct, then it is not too much to say that, as argued by Hughes, Q.C., in *Barron v. Willis* (r), *Nedby v. Nedby* is inconsistent with the other authorities. It may or may not be indicative of the opinion in which it was held that *Nedby v. Nedby* was not cited from 1852 until, by the ingenuity of counsel, it was made to do duty in 1899.

In Ontario the question came up squarely for decision in *McCaffrey v. McCaffrey* (s), and the conclusion would seem to be justified that the decision of the Court of Appeal is more in accordance with the principles of equity, and more in consonance with public policy, than that in *Barron v. Willis*. In *McCaffrey v. McCaffrey* a voluntary conveyance of his property by a husband to his wife, a woman of good business ability and having great influence over him, executed without competent and independent advice,

(p) (1778) *Hulme v. Tenant and wife*, 1 Bro. C. C. 16.

(q) 2 W. & T. L. C., 6th ed., 597.

(r) Page 584.

(s) (1891) 18 A. R. 599.

when his physical and mental condition were greatly impaired, he subsequently becoming an incurable lunatic, was set aside. Chief Justice Hagarty dissented, but explicitly stated that he treated the case as one of fact.

In *Trusts and Guarantee Co. v. Hart* (t), Mr. Justice Street, delivering the judgment of the Queen's Bench Divisional Court, says: "The rule has not been confined to the more common and obvious cases of trustee and cestui que trust, but has been treated as applying to every case where confidence has been reposed."

McCaffrey v. McCaffrey was cited in argument before the Chancery Divisional Court in *Casey v. Maloughney* (u) and some discussion occurred as to the law in cases of husband and wife, but the judgment of the court did not deal with the point.

Altogether it is submitted that the cases of *Nedby v. Nedby* and *Barron v. Willis* must be regarded as being in a state of "splendid isolation," and intended only to act as warnings to importunate wives and husbands that, where a particular equity requires it, the court will not be bound by any hard and fast rule, but will endeavour to apply the law so as to do justice to all concerned.

JOHN G. O'DONOGHUE.

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In connection with the above article we would note a case of *Hopkins v. Hopkins*, decided since it was written, at the last sittings of the Court of Appeal. Whilst, as Lord Penzance says, "Persons standing in certain relations to one another, such as parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, guardian and ward are subject to certain presumptions when transactions between them are brought in question"—it nevertheless seems clear that whilst the relations of husband and wife are included in the list, there would not be the presumption against a gift by a husband to his wife which there would be in the case of attorney and client, etc., and the matter becomes largely one of evidence and onus probandi.

(t) (1900) 31 O. R. at p. 420.

(u) Not reported. Judgment delivered 19th Feb., 1900.

The Forum.

A CAUSERIE OF THE LAW.

CONDUCTED BY CHARLES MORSE, D.C.L.

In the recent case of *The People of the State of New York v. The Buffalo Fish Company (Limited)* the New York Court of Appeals was called upon to decide whether the Act of the State legislature for the protection of Birds, Fish and Wild Animals, etc., (ch. 488, Laws of 1892) applied to fish *possessed* during the close season, although *taken* from waters outside the State. The *Albany Law Journal* states that the question had been the subject of controversy for a long time, from the fact that people were in the habit of importing fish from Canada in ice during the close season. The question was decided in the negative by a majority of the Court. O'Brien, J., in delivering the opinion of the majority says:

"We all agree that our statute does not forbid a person to 'catch or kill' fish of any kind in Manitoba, but it is said that when one brings the fish so caught or killed into this State, the penalties of our statute attach to him at once. With all respect, I am constrained to say that this is not a reasonable or tolerable interpretation of a penal statute. What it means, and all it means, is to forbid any person to catch, kill or be possessed of the fish described from the waters of this State. The word 'possessed' obviously refers to those fish, the catching or killing of which is forbidden, that is to say, fish in the waters of this State, and not those procured in any foreign country. It is simply a perversion of the statute to hold that the mere possession by any person within this State of the fish described in the statute, during the close season, is a violation of it, without regard to the place where they were procured, or to the manner obtained."

Since the object of the legislature was undoubtedly to preserve the fish in the waters of New York State, and not to tie up piscatorial enterprise in the waters of the whole American continent, this opinion strikes us as being an eminently sane one.

* * * Just why 'conventio,' the generic term of the Roman Law for agreements between persons to do or abstain from doing a particular thing (Dig. II., 14, 1), should have been restricted in early English law to denote only that species of contracts which were evidenced by writing under seal, is not easy to determine. Probably the solution of the question lies in the fact that he

earliest 'conventiones' (covenants) appearing in English juridical history were leases of land, and that when commerce developed and simple contracts came into vogue, it was found convenient to leave specialties in undisputed possession of the phrase. Glanvil (X., 8) uses the term 'conventio' in its generic import; and so do Bracton (De Leg. et Cons. Ang. II., ch. 5) and Fleta (ch. 9). In the Year Books we find the term 'covenant' used in the restricted sense so early as the year 1338. (See Y.B. XII., Edw. III). Austin, however, claims that 'contract' is a term of uncertain extension in English law, and that it is sometimes used in exactly the same sense as that in which the Roman lawyers employed the word 'conventio.' (Prov. Juris. Det. II., 982). He admits, on the other hand, that 'conventio' (covenant) is never synonymous with 'agreement' in the terminology of our own legal system, but is confined to the class of contracts above described. Matthew Bacon ("Abridgment") derives 'covenant' from the Latin *convenire*, or *conventus*, and says that in its largest sense it is identical with the term contract. The author of the ancient "Mirror of Justices" defines 'contract' as follows: "Contract est purparlance dentre gentz qe chose nient fet se face;" which the editor of the Selden Society's edition of the work translates: "Contract is a *discourse* between persons to the effect that something that is not done shall be done" (ch. 27, p. 73). But in an undertaking purporting to present an archaic authority in a modern dress, why employ the term 'discourse' which only in a remote, and now entirely obsolete sense, conveys the idea of 'dealing' or 'transaction,' and in its ordinary signification is, quoad hoc, absolutely meaningless? What the old writer probably meant by 'purparlance' was 'treaty' or 'negotiation,' and while his definition at its best is inadequate enough, it is a thousand pities that his shortcomings should be intensified by inapt interpretation.

* * * Englishmen are wont to pride themselves in the fine scholastic attainments of their great statesmen of the past, and certainly the record from Sir Thomas More to Gladstone is a magnificent one. But the political history of the United States also discloses a list of some of the best trained minds in the world's chronicle of statesmen. Daniel Webster was accorded first place as a student when he attended Dartmouth College, and his speeches attest the breadth of his academic training. President

Madison remained in Princeton a year after his graduation for the express purpose of making himself proficient in Hebrew. It is said that his studies in theology predisposed his mind to the support of Jefferson's measures for religious tolerance in Virginia. Jefferson, himself, was an ardent student. The curriculum which he framed for himself and his friends was so exacting that Hamerton ("Intellectual Life") doubted that the human mind could stand such a strain. One of his granddaughters said of him that he read Homer, Virgil, Dante, Corneille and Cervantes with as much facility as he did Shakespeare. It is also related of him that he disliked Scott's novels and Hume's history, and cordially hated Blackstone's Commentaries—the latter being a matter in which he has our lively sympathy. Then there is that fine old pedant John Randolph of Roanoke, who soundly rated his doctor on his death-bed because the latter unhappily tripped in his orthoepy. What a way for the boasted descendant of Pocahontas to treat his medicine-man on the eve of his departure for the happy hunting-grounds! Randolph is said to have rambled through every field of English literature. John Quincy Adams was a "monster of erudition." He left behind him a library of 12,000 volumes, and a chest of manuscripts of original and translated matter. He was a veritable *heluo librorum*, having devoured Rollin's Ancient History at ten years of age. John C. Calhoun was another American statesman of broad scholarship. Nor was his learning confined to the humanities; on one occasion he disgusted a naval officer, and on another charmed a celebrated photographer by demonstrating that he knew more than either of them concerning their respective avocations. Benjamin Franklin played chess under a penalty in case of defeat of making a translation from some Italian author. He reversed the usual order of progression in the study of languages by learning French, Italian and Spanish first, and thereafter acquiring a knowledge of Greek and Latin. We cannot exclaim in this particular: *Transeat in exemplum!* William Pinkney was another statesman of wide erudition and culture. Chief Justice Marshall said of him that he was the greatest man he had ever seen in a court of justice. In his forensic addresses, by the universality of his knowledge and the tribute he adroitly levied upon every department of intellectual achievement when occasion demanded or justified it, he exemplified the truth of Burke's saying that the sparks of all the sciences are to be

found in the ashes of the law. When we are thinking of great American statesman Rufus Choate does not fail to 'swim into our ken.' Like Webster, he was a graduate of Dartmouth College. It was commonly said of him that while he was an under-graduate he was eminently fitted to take a professorial chair in arts in any university in the country. After he became the foremost American lawyer of his time, and a prominent statesman, he did not fail to daily haunt the Muses' home and quaff the waters of Aganippe. It was his wont to spend the early hours of the morning with the Greek and Latin authors who had appealed to his youthful fancy with so potent a charm. His chief speeches in the United States Senate, and on public occasions, shew how carefully he had sown his mental garden with the seeds of ancient and modern learning. As an orator he had no equal amongst his contemporaries; and of him it may have been truly said by his countrymen at his death: "Take him for all in all, we shall not look upon his like again." And with Choate we must close our survey of this very interesting subject, not because we have exhausted our material, but because we have arrived at the limit of our space. In quitting our theme, however, we feel it due to the legal profession to point out that all but one of the great statesmen we have mentioned were lawyers.

* * * "Law so dry—I deny it," said Lord Bramwell, but is there anything more anhydrous in the whole legal domain than the late lamented judge's own forensic and journalistic lucubrations?

 ENGLISH CASES.

 EDITORIAL REVIEW OF CURRENT ENGLISH
DECISIONS.

(Registered in accordance with the Copyright Act.)

PRACTICE—SPECIAL LEAVE TO APPEAL—APPEAL IN FORMA PAUPERIS—PRIVY COUNCIL—STAY OF EXECUTION.

Quinlan v. Chila (1900) A.C. 496, is a somewhat peculiar case. Quinlan had sued the defendant Child, who was Chief Justice of St. Lucia, for £500 damages, to which claim the defendant had filed a demurrer and defence with the result that the plaintiff was non-suited by the acting Attorney-General sitting as a judge. The Court of Appeal for the Windward Islands dismissed an appeal of the plaintiff from that decision, but gave leave to appeal to the Queen in Council, but refused the appellant leave to prosecute his appeal in forma pauperis on the ground of want of jurisdiction. The appellant then applied to the Judicial Committee of the Privy Council for leave to prosecute his appeal against Child in forma pauperis, on the ground that he had not been able to obtain a fair hearing, and in consequence of all his property having been levied on under orders made by the respondent, he was totally without means. He also applied for leave to appeal from judgments rendered in two other cases against him by the said Child as Chief Justice, and also to stay execution under one of such judgments. The Committee granted leave to prosecute the first mentioned appeal in forma pauperis, and also gave leave to appeal in forma pauperis from the judgments in the other cases but held that they had no jurisdiction to stay the execution. The order was made ex parte and the appellant was warned that he must be prepared to meet any motion the respondent might see fit to make to rescind the order. The Committee probably was to some extent influenced by the fact that the integrity of a judge was in question.

VENDOR AND PURCHASER—TITLE OF VENDOR, THAT OF TRUSTEE WHO HAS PURCHASED FROM HIMSELF—BENEFICIARIES, CONSENT OF.

In *Williams v. Scott* (1900) A.C. 499, an appeal was had from the Supreme Court of New South Wales in an action by a purchaser to rescind a contract for the sale of land. The question at

issue was whether the vendors title was a good and marketable one. The sale took place under a power of sale in a mortgage and it appeared that the plaintiff's mortgagor was a trustee for sale of the land in question under the will of his mother, and had acquired title as purchaser under a deed from himself and co-trustee. The purchaser objected to the title upon the ground that the mortgagor was incapable of purchasing from himself and his co-trustee. The vendor produced a copy of an alleged release from all the beneficiaries which was objected to as not showing that the beneficiaries were aware of the effect of the transaction in question, and the purchaser required a deed of confirmation which the vendor refused to procure, and alleged that they had since discovered that the sale had not been in fact made to the trustee but to one of the beneficiaries, and that subsequent to the contract the trustee had agreed to take the bargain off his hands, and the conveyance had, in pursuance of the latter contract, been made direct to the trustee. The Judicial Committee of the Privy Council (Lords Davey, Robertson and Lindley, and Sir H. DeVilliers and Sir F. North) held that the title was one which could not be forced on an unwilling purchaser. The alleged intermediate sale was held not to avail to make the sale to the trustee good as it was not a completed one, and the Committee adopted the decision in *Parker v. McKenna* (1874) L.R. 10 Ch 96, to the effect that a trustee cannot validly adopt for his own benefit an executory contract to purchase to which he is himself a party as vendor. The appeal was accordingly allowed and judgment awarded rescinding the contract with costs.

To those who are desirous of abolishing the right of appeal to Her Majesty in Council, the batch of appeals allowed in this number of the reports may afford some ground for reconsidering their views.

BANK—CROSSED CHEQUE—"NOT NEGOTIABLE"—PAYMENT—BANKER, LIABILITY OF—"CUSTOMER"—BILLS OF EXCHANGE ACT, 1882, (45 & 46 VICT. C. 61) s. 82—(53 VICT. C. 33, ss. 80, 81, D.)

In *The Great Western Ry. Co. v. The London & County Banking Co.* (1900) 2 Q.B. 464, the Court of Appeal (Smith, Williams and Romer, L.JJ.) have upheld the judgment of Bigham, J., (1899) 2 Q.B. 172 (noted ante vol. 35, p. 704). It may be remembered that the facts were as follows: A rate collector had induced the plaintiffs to send him a cheque for taxes alleged to be, but which

were not in fact due. The drawers crossed the cheque and marked it "not negotiable." The collector had been in the habit for years past of cashing cheques received for rates at a country branch of the defendants' bank. He indorsed the cheque and obtained part of the cash for it at the defendants' branch, and the balance was applied according to his direction. The defendants received payment of the cheque at the bank on which it was drawn before the collector's fraud was discovered. The drawers of the check sought to recover the amount of it from the defendants. It was found as a fact that the defendants had received the payment in good faith and without negligence. The Court of Appeal agreed with *Rig- ham, J.*, in holding that, under the circumstances, the collector was a "customer" of the defendants within the meaning of s. 82 of the Bills of Exchange Act (s. 81 of Can. Act) though he had no account with the defendants, and, also, (*Williams, L.J.*, doubting this), that the defendants received payment of the cheque for the collector and not for themselves, and that therefore they were protected under s. 82, and were not liable to refund.

BILL OF SALE—REGISTRATION—VALIDITY—GRANTOR KNOWN ONLY BY ASSUMED NAME—NAME OF GRANTOR.

Stokes v. Spencer (1900) 2 Q.B. 483, was a rather unusual case touching the validity of a bill of sale. An unmarried woman named Ott lived with a man named Spencer, whose name she assumed. After his death she continued to be known as Mrs. Spencer, and whilst so known she executed a bill of sale in her name of Ott, and without any reference to her assumed name. Its validity was attacked by a creditor of Mrs. Spencer. *Grant- ham and Channel, JJ.*, held, that the bill of sale was valid, as there is nothing in the English Bills of Sale Act requiring the grantor's correct name to be mentioned in the register.

CHARGING ORDER—APPLICATION TO DISCHARGE EX PARTE ORDER—LACHES—(ONT. RULE 358).

In re Deakin (1900) 2 Q.B. 489, was an application to discharge a charging order obtained by a solicitor ex parte. The motion was not made until after the lapse of two months from the service of the order, and no sufficient cause was shewn for the delay. The Court of Appeal (*Webster, M.R.*, and *Rigby and Collins, L.JJ.*) agreed with *Wright, J.*, that the application was too late, and should not be entertained.

Correspondence.

LAW REFORM.

To the Editor of The CANADA LAW JOURNAL.

SIR,—In spite of ~~some~~ words of yours at the conclusion of Colonel Denison's letter in your issue of November 1st, appearing to deprecate further discussion of the matters therein contained, I venture to think that when a gentleman of the standing and with the experience of our Police Magistrate formulatés in the pages of a legal journal something like a definite scheme of law reform, and when his letter, as has been the case here, finds its way into the daily papers, to the bewilderment, doubtless, of many of the lay public, some attempt at a specific answer to the points made by him will not be altogether out of place.

I will not dwell upon the first part of the letter, in which the supposed normal fate of a litigant in our courts is sketched, but will merely observe that Colonel Denison seems to have entirely overlooked the undoubted fact that our law is at all events sufficiently definite to prevent the vast majority of the disputes which actually arise in the community from coming into the courts at all, while it is equally undoubtedly the case that of those who do come into the courts not one in a thousand has the career indicated by him.

Coming down to what I may call the constructive part of Colonel Denison's letter, his proposed reform in the administration of civil justice consists of three suggestions :

- (1.) " Musty precedents, perhaps the mistakes of men gone by, should not be worshipped or followed to create injustice ; "
- (2.) There should be only one appeal, which should be final ;
- (3.) The State should ~~do away with~~ all fees of every kind, and hire lawyers at fixed salaries to assist the judges in bringing forward evidence.

There was a Constitution of the Emperor Justin (A.D. 518-27) which would, I take it, entirely meet Colonel Denison's approval. It ran as follows : " Let no judex or arbiter deem that he should follow cases which he has thought wrongly decided, much more let him not think that he should follow the opinions of magistrates or other rulers ; for the fact that a point has been wrongly decided is

no reason for extending the folly to other judges, for judgment should be given not according to precedents but according to the law."

The only words which Colonel Denison would disapprove of, I take it, are the last five, for he would apparently have no law whatever.

It is perfectly true that nowhere else than in England, and in countries which have derived their legal systems from England, have decisions of judges been systematically treated as authoritative. But the Romans were far from consigning litigants to the mere discretion of the magistrate. They, however, attached but small importance to decided cases, resting their law not upon them but upon the opinions of patented jurists possessed of the *jus respondendi*. But whatever advantages this system might have over our own in the direction of a more even and logical evolution of law, it certainly cannot have done much to remove the difficulty of ascertaining the law applicable to actual disputes arising amongst men. Indeed, we know that at various times attempts were made to meet this difficulty, until at last Roman jurisprudence sank to the point of "counting heads;" the famous Law of Citations of Valentine III. (A.D. 426) selecting five of the classical jurists of the greatest repute, and directing all judges to adopt for the decision of questions arising before them the law laid down by the majority of them, with a casting vote, so to speak, in favour of the excellent Papinian. But it stands to reason that there remained abundant opening for endless argument as to the applicability of citations from the writings of these sages to practical cases. And at any rate the difference between such a system and our own may be likened to the difference between drawing your water from a stagnant reservoir and taking it from a living stream.

However, the continental view of the matter, which looks for the law rather in the commentaries of jurists than in the decisions of the courts, is an inheritance from the law of Rome. In England cases have been cited in court as authoritative at all events from the time of King Edward I. And we are told by Sir Frederick Pollock that where the two systems have come into competition, as they have done in the Province of Quebec, the Cape Colony, and other British possessions originally settled under continental systems of law, the method of ascribing exclusive authority to judicial decisions has invariably been accepted. Under this system

has been built up the wonderful fabric of our common and equity law. Under it the law of England has developed as an organic growth in close touch with the practical requirements of those for whose use it exists, and with the development of the national life. So that it has been well said that a closer connection between the springs of law and the springs of life it is impossible to find, look we the whole world over, than the common law of England.

With one fell swoop of his sword, however, Colonel Denison would cut off this heritage of centuries. He would reduce our whole system of administration of justice to the state in which equity was in the first half of the seventeenth century in England, when old John Selden declared: "Equity is a roguish thing. For law we have a measure. We know what to trust to: equity is according to the conscience of him that is Chancellor, and as that is larger or narrower so is equity. 'Tis all one as if they should make the standard for a measure a Chancellor's foot. What an uncertain measure would this be? One Chancellor has a long foot, another a short foot, a third an indifferent foot; it is the same thing in the Chancellor's conscience."

It was not long, however, before equity law in England rose almost, if not quite, as far beyond such a state of things as the common law, and Blackstone dates from the chancellorship of Lord Nottingham, in the reign of Charles II., the foundation of a regular and connected system of equity jurisprudence and jurisdiction, governed by established rules and bound down by precedent.

It might be admitted, indeed, that if we could multiply our Police Magistrate a thousand fold, and at the same time render him and all his duplicates immortal, so that one of them might preside over every tribunal throughout the country, we should at least have only the variations between two feet to reckon with, while at the same time all cases would come before an acute and thoroughly honest and impartial judge; but in no other conceivable way that I can imagine, could the system advocated by Colonel Denison fail to plunge the community, so far as the settlement of their disputes is concerned, into a condition of uncertainty far greater and infinitely more exasperating than anything which exists under our present system.

I can ask but a few lines to deal with the other two points.

(2.) How many courts of appeal there are to be is certainly a mere matter of convenience. If, however, there was only one

court of appeal, it stands to reason that the work that would come before it would be so heavy that it would have to consist of many different divisions, and comprise an immense number of judges. It is difficult, in fact, to see how the number of judges could be any less than under our present system, although no doubt it would not be essential that they should all be of the same mental calibre, if one may presume to draw a distinction of that sort between judges. Nevertheless, to deal with all the superior court cases alone that went to appeal, an immense number of appellate judges would be required, and all of them would have to be, (sitting, as they would do, as the one final tribunal), men as far as possible of equal distinction and ability. This would certainly involve an enormous expense to the State, for in the long run the market value has to be paid for ability wherever its services are required. As to the litigant, it may be doubted whether on the whole he would gain in the matter of expense. The tendency, I take it, would be for great particularity and elaboration to characterize the procedure in such a final court, and to necessitate resort being had to the highest legal ability in the matter of counsel, since each case would represent the one last chance of the parties to get what they considered their rights.

(3.) But Colonel Denison would have all counsel paid officials of the State. I do not think the experience of bureaucracy will commend this proposal to anybody. In fact, it is simply appalling to think of litigants having to submit the conduct of disputes, in which, perhaps, all their fortune is involved, to the tender mercies and salaried sympathy of paid officials. The thought is too painful to dwell upon.

A. H. F. LEFROY.

REPORTS AND NOTES OF CASES.

Province of Ontario.

HIGH COURT OF JUSTICE.

Meredith, C.J.] CHALLONER v. TOWNSHIP OF LOBO. [June 18.

By-law — Drainage — Petition for—Qualification of petitioners—“ Last revised assessment roll”—“ Exclusive of farmers' sons not actual owners”—Invalid by-law—Damages.

In an action for an injunction to restrain a municipality from proceeding with the work under a drainage by-law.

Held—1. The assessment roll last revised previous to the passing of the by-law is the one to be looked at for the purpose of ascertaining whether the petition for the work was sufficiently signed to authorize the passing of the by-law.

2. The words “exclusive of farmers' sons not actual owners” in sub-s 1 of s. 3, R.S.O. c. 226, does not refer to farmers' sons who are not actual owners in fact, but to farmers' sons so shewn by the last revised assessment roll.

3. Two sons to whom a father was willing and promised to grant his farm taking back a life lease had an interest in the land of a freehold nature entitling them to be assessed as joint owners and were not “farmers' sons not actual owners.”

4. Following *Connor v. Midagh* and *Hill v. Middagh* (1889), 16 A.R. 356 and *McCulloch v. Township of Caledonia* (1898), 25 A.R. 417, that the by-law not having been quashed the plaintiff was not entitled to damages for work done under it although invalid.

T. G. Meredith, for plaintiff. *Macbeth*, for corporation. *Alex. Stuart*, Q.C., for defendant Oliver.

Street, J.] LOVE v. LATIMER. [Oct. 5.

Trade name—Sale of business—With right to use for limited period—Right to use after period expired.

The proprietor of a firm name of no pecuniary value per se, and not being merely his own name, who has sold the business with which it was connected, and with it the right to use the firm name for a limited period cannot, after the expiry of the time, prevent the user of such name when he himself does not carry on or intend to carry on business under it.

Meek, for plaintiff. *Heighington*, for defendant.

Street, J.]

WILLIAMS v. TOWN OF CORNWALL.

[Oct. 10.

Words — "*Porch or projection attached to any dwelling*" — *Verandah* —
47 Vict., c. 50, O.

A survey of the Town of Cornwall was confirmed by 47 Vict., c. 50 (O). This Act declared the survey to lay down correctly the lines of the street as originally laid out, and provided that:—"Where any dwelling house or shop . . . had been before January 1st, 1888, partly built upon any street as ascertained by said survey, it shall not be incumbent upon the owner or occupant of such dwelling house, shop or building to remove the same off such street until the rebuilding of such dwelling house, shop or building or the repairing thereof to the extent of 50 per cent. of the then cash value thereof; but this proviso shall not apply to any fence, steps, platform, sign, porch or projection attached to any such dwelling house or shop." The said survey shewed that a certain dwelling encroached four feet upon the street and that the verandah attached to it encroached three feet six inches farther upon the street. The verandah was made of wood, resting on stone pillars, having its own roof and being firmly attached to the house.

Held, that the verandah was an integral part of the dwelling house and not a porch or projection attached to it, and was not to be considered an obstruction on the street which should be removed within the above proviso of 47 Vict., c. 50.

Held, therefore, that the position of the dwelling house and verandah did not bar the owner from applying for compensation under the Municipal Act for damage sustained by reason of the Corporation having lowered the grade of the street in front to an extent interfering with his access.

D. B. MacLennan, Q.C., for plaintiff. *Jas. Leitch*, Q.C., for Town of Cornwall.

Rose, J.]

[Nov. 2.

IN RE GEDDES AND GARDE, AND IN RE GEDDES AND COCHRANE.

Renewal lease—Increased rent—Construction.

A clause in a lease providing for a renewal stated that the renewal lease was to be "at such increased rent as may be determined upon as hereinafter mentioned, payable in like manner and under and subject to the like covenants, provisions and agreements as are contained in these presents, including the covenant for renewal, such rent to be determined by three different disinterested persons as arbitrators." The lease further provided for payment of the yearly rent as follows: "For the first ten years of the said term eighty dollars per annum; for the remaining eleven years one hundred dollars per annum, all the said payments to be made half yearly on the first day of January and July in each year."

Held, that the proper manner by which the rent should be increased

during the renewal term was by adding to each payment during the twenty-one years, that is to say, adding to the rent of eighty dollars per annum for the first ten years of the renewal term and to the rent of one hundred dollars per annum for the remaining ten years of the renewal term, and not by adding together the annual payments for twenty-one years and making an addition to that, nor by adding to the sum payable during the last year before the renewal.

Held, also, that the condition as to the rent for the new term, being an increased rent, might be satisfied by making a merely nominal addition, there being no increase in the rental value of the premises.

Riddell, Q.C., and *J. McGregor*, for tenants. *Gamble*, for landlord.

Meredith, J.] CONLEY v. CANADIAN PACIFIC RAILWAY. [Nov. 4.
Railways—Consignor and consignee—Delivery to wrong person—Liability.

The plaintiff consigned to the defendants certain goods to the "I. C. Company," simply. He knew that the company had not yet been incorporated; he also knew that the defendants' practice was never to deliver the goods consigned "to order" without the production and endorsement of the shipping bill, but that when not consigned "to order" they did sometimes deliver the goods without the production of the shipping bill. The defendants did not deliver the goods to a person carrying on business under the name of the I. C. Company and at the ostensible office of the company.

Held, that the plaintiff was most to blame for such delivery, and that the defendant was not liable by reason of their having delivered the goods without first requiring the production of the shipping bills. There is no law here requiring carriers to take up the shipping bills before the delivery of goods.

Davis, for plaintiff. *Aylesworth*, Q.C., and *Denison*, for defendant.

Boyd, C., Falconbridge, C. J., Street, J.] [Nov. 5.]

PRITCHARD v. PATTISON.

Evidence—Motion—Security for costs—Nominal plaintiff—Insolvency—Affidavit—Notice of Motion.

The decision of ROSE, J., ante 423, affirmed on appeal; STREET, J., dissenting.

Held, per BOYD, C., that an application for security for costs on the ground that the plaintiff is insolvent and is only nominally interested in the action should be based on an affidavit of belief on the defendant's part that such are the facts, and such an affidavit should at least be furnished by the defendant before he attempts to establish the facts by examining the plaintiff.

Semble, that the proper practice in such a case is to have the grounds set forth in the notice of motion, as was done in *Port Rowan and Lake Shore R. W. Co. v. South Norfolk R. W. Co.*, 13 P. R. 327; and if this method were adopted, an affidavit of belief might be dispensed with if it was proposed to establish the facts alleged out of the mouth of the plaintiff.

Held, per FALCONBRIDGE, C. J., that the finding of ROSE, J., that the plaintiff had a substantial interest, should be adopted, and such being the position the defendant had no right to prove the plaintiff's poverty out of his own mouth on this application.

Per STREET, J., dissenting, that the defendant was entitled to examine the plaintiff for the purpose of shewing that he was a mere nominal plaintiff suing for the benefit of another, as well as for the purpose of shewing his insolvency; and the defendant could not be required to establish each particular proposition involved in his motion, in its logical order, before proceeding with the next.

Leave was given to the defendant to proceed in proper form with his application for security.

Rose, J.]

GRAVES v. GORRIE.

[Nov. 6.

Copyright—Works of fine art—Imperial Act—The Colonies—Imp. 25 & 26 Vict., c. 68.

The Imperial Act, 25 & 26 Vict., c. 68, being an Act for amending the Law relating to Copyright in Works of Fine Art, and for repressing the commission of fraud in the production and sale of such works does not extend to the Colonies, but the copyright therein and thereby conferred is confined to the United Kingdom.

J. T. Small, for plaintiffs. *J. H. Denton*, for defendants.

Boyd, C.]

[Nov. 6.

STURGEON FALLS ELECTRIC LIGHT AND POWER CO. v. TOWN OF
STURGEON FALLS.

Costs—Taxation—Affidavits—Irregular filing.

The costs of affidavits for use on a motion in the Weekly Court filed with the Clerk in Chambers, instead of in the Registrar's Office, as required by rule 102, should nevertheless be taxed, if otherwise taxable, where such affidavits have been before the Court on the motion and are recited in the order made thereon.

A. M. Stewart, for plaintiff. *H. E. Rose*, for defendants.

Ferguson, J.] MCHUGH v. GRAND TRUNK R. W. Co. [Nov. 6.
Executors and administrators — Lord Campbell's Act — Action by administrator — Death of sole beneficiary.

An action was brought under Lord Campbell's Act by the administrator of the estate of a person whose death was alleged to have been caused by the negligence of the defendants to recover damages occasioned by such death for the benefit of the mother of the deceased, who was the only person for whose benefit an action could be brought. She died pending the action, before it came to trial.

Held, that, assuming that the plaintiff was entitled to recover for the benefit of the mother, had she not died, the effect of her death was only to reduce the amount to be recovered, and there was some sum of money which at the time of her death she was beneficially entitled to receive when recovered, and this sum when recovered would constitute part of her estate and be payable to the administrator thereof. And therefore the action could be proceeded with, notwithstanding her death, but the appointment of an administrator was necessary.

W. E. Middleton, for plaintiff. *D. L. McCarthy*, for defendants.

Falconbridge, J., Street, J.] IN RE CROSS. [Nov. 12.
Elections — Corrupt practices — Proceeding by summons — Limitations — Several charges.

Cross was convicted before two judges sitting under ss. 187, 188 of the Ontario Election Act, R.S.O. c. 9, for the trial of corrupt practices, committed at an election, for three several corrupt practices, and the penalty of \$200 for each offence was imposed with imprisonment on default of payment.

Held, 1. The fact that the proceeding had not been commenced until after the expiration of one year from the time the corrupt practices were committed was no bar to them, inasmuch as that limitation applies only to actions for penalties under s. 195 of the Act.

2. It was no valid objection to the conviction that the judges constituting the court reserved judgment after hearing the evidence on one of the charges until they had heard evidence on the others.

Lynch Staunton, for defendant. *Dymond*, for Attorney-General.

MacMahon, J.] WILDMAN v. TAIT. [Nov. 12.
Municipal corporation — Assessment — Sale for taxes — Imperfect description — R.S.O. c. 224, s. 13.

Some lots were assessed in the following way :

Occupant.	Owner.	Size of lot.
Water lots.	John Maughan.	436 x 660.

Held, that the assessments were invalid as containing no description of the locality of the lots.

Though the water lots in question were numbered according to a registered plan giving the dimensions, instead of being assessed as numbered lots according to such plan, they were assessed en bloc as having a frontage of 436 feet on the shore line of Lake Ontario, by a depth south into the lake of 660 feet. Lots as numbered on the plan were owned by different people; moreover, the plan only shewed a depth of individual lots on it of 100 feet.

Held, that the assessment was invalid as disregarding the essential requirements of R.S.O. c. 224, s. 13.

Beck, for plaintiff. *A. C. Macdonell*, for defendant Magann.

Falconbridge, C. J., Street, J.]

[Nov. 13.]

MURRAY v. WURTELE.

Revivor — Substituted plaintiff — Absence of consent — Liability for costs — Transfer of right pendente lite — Stay of proceedings.

It may, in rare cases such as *Chambers v. Kitchen*, 16 P.R. 219, be "necessary or desirable" under Rule 396 to add or substitute a person as plaintiff, without the consent required by Rule 206 (3), upon the application of the opposite party; but where it becomes necessary to substitute a person as plaintiff without his consent, to prevent injustice, he should not be exposed, without some further action on his part or adoption by him of the position into which he is forced, to any liability for damages or costs.

Under the circumstances of this case, the fact that F. had become pendente lite the transferee of the promissory note sued on did not entitle the defendants to an order substituting him as plaintiff and making him liable for the costs of the action.

But the original plaintiff could not be allowed to prosecute the action further, because he has no longer any interest in it, and F. could not be allowed to do so because he had not caused himself to be substituted as a plaintiff, nor obtained leave to proceed in his own name upon the judgment pronounced in favour of the plaintiff, which had not been entered, but from which the defendants sought to appeal; and all further proceedings in the action should, therefore, be stayed, but without costs.

J. H. Moss, for plaintiff and Thomas Fraser. *J. E. Jones*, for defendants.

Trial of Actions, Boyd, C.]

[Nov. 14.]

BROWN v. TORONTO GENERAL TRUSTS COMPANY.

Donatio mortis causa — Banker's pass book.

Held, that a banker's pass book given upon receipt of a deposit which was numbered, and in which it was stipulated that the deposit will not be

repaid without production of the said pass book is a good subject of *donatio causa*, The book was contemporaneous with the debt, was delivered to the creditor, was essential to the proof of the contract, and the production of it essential before the money could be redeemed. The delivery of such a pass book of money on deposit in anticipation of death operates as a transfer of the debt to take effect upon death.

Parker, for plaintiff. *A. L. Colville*, for defendants.

Falconbridge, C.J., Street, J.]

[Nov. 17.

MACDONALD *v.* SHEPPARD PUBLISHING CO.

Discovery—Defamation—Justification—Immorality—Disclosure of name of paramour.

The defendants having in their newspaper charged the plaintiff with immorality, the plaintiff sued them for libel, and the defendants pleaded that the charge was true. The plaintiff having required particulars, the defendants set forth that the plaintiff lived at a house of ill-fame; that he lived at a particular place in adultery; that a child was born to the woman with whom he lived; and that he brought to his house and kept with the members of his family a woman who had lived in a house of ill-fame. The plaintiff, being examined for discovery, admitted that he had lived in adultery with a woman who had previously lived in a house of ill-fame, and that she bore a child of which he was not the father, but denied the other allegations of the particulars.

Held, that the plaintiff was bound to disclose the name of the woman, although such disclosure might injure her.

Bradford, for plaintiff. *Riddell*, Q.C., for defendants.

Falconbridge, C.J., Street, J.]

[Nov. 17.

MILLAR *v.* THOMPSON.

Attachment of debts—Fraud—Issue—Amount in controversy—County Court jurisdiction—Residence of garnishee—Rules 917, 918, 919—Order for receiver.

Where it was charged by a judgment creditor that a fraudulent arrangement had been made between the judgment debtor and his employers, the garnishees, whereby a third person had been substituted for the debtor as the servant of the garnishees, and money paid to such third person, while the debtor continued to do the work,

Held—1. The judgment creditor was entitled to have an issue directed, to which the third person should be a party, to determine whether there was at the time of the service of the attaching order any debt due or accruing from the garnishees to the debtor, without bringing home a case of fraud to the persons against whom it was charged; it was sufficient to

shew unexplained facts and circumstances so unusual as to create a strong suspicion that fraud has been practised.

2. Upon the proper construction of rules 917, 918 and 919, the judge of a County Court in which the judgment has been recovered has power, when the amount claimed to be due from the garnishee is so large as not to be within the jurisdiction of a County Court, to make the garnishing summons returnable before himself, even where the garnishee resides in another county.

3. An order for a receiver should not be made in respect of a fund which may be reached by garnishing process.

Idington, Q.C., for plaintiffs. *R. N. Ball*, for defendants and others interested.

Meredith, C. J.] *MANN v. GRAND TRUNK R. W. CO.* [Nov. 22.

Deed—Construction—Gravel—Subsequent deposit.

In 1856 the owner of land by deed conveyed to a railway company "the gravel situate and being on and comprised within a certain part" of the land, with the right of way for a railway track, and the free and unobstructed use thereof, and covenanted for quiet possession, free from incumbrances, of the gravel and other the premises conveyed.

Held, that gravel deposited on the land since the date of the deed, owing to the action of the waters of a lake, did not pass by the deed.

J. H. Moss and *Swayze*, for plaintiffs. *Wallace Nesbitt*, Q.C., for defendants.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] *THE QUEEN v. MACCAFFERY.* [March 13.

Theft—Criminal Code ss. 743, 746, 747—Evidence to support conviction—Case reserved—Question not properly before court—New trial—Remedies open to party accused.

The defendant was tried before the Judge of the County Court for the Metropolitan District of the County of Halifax on the charge of having stolen a sum of money, the property of a fellow seaman. The evidence shewed that the prosecutor and defendant, with a number of other seamen employed on board the steamship "Minia," lived and slept, and had their belongings, including several chests, in a place in the fore part of the ship called the "square." Defendant in common with others of the ship's

hands was paid the balance of wages due him, amounting to \$7.96, on the 23rd December. On the same day he obtained an advance of \$7, alleging that he had spent all his previous pay. He endeavoured to obtain a loan of \$5 from the prosecutor, and stated to one of the officers of the ship that he was short of money. He stated to a fellow seaman that the officer in question had loaned him a sum of money, but it appeared the statement was untrue. At noon on the 25th December the prosecutor placed a wallet containing the sum of \$26 in his chest and locked it up. On the same afternoon the defendant, who had been about the room where the chest was, was seen in possession of a roll of paper money including two \$5 bills, and on the same evening he loaned \$5 and \$2 in paper money to two of the ship's hands who were in his company. The following day the prosecutor went to look for his money and found that his chest had been opened and the money taken. No attempt was made to identify the money seen in the defendant's possession with that stolen from the prosecutor, nor was it shewn that the defendant had knowledge that the prosecutor had placed the money in his chest.

The learned judge of the County Court having convicted defendant, reserved the two following questions for the opinion of the Court: (1) Whether or not there was any legal evidence to support the conviction. (2) Whether he was justified in drawing from the facts stated a presumption sufficiently strong to justify him in finding a judgment of guilty.

Held. 1. In answer to the first question that there was evidence to support the conviction.

2. In answer to the second question, that the question was not properly before the Court.

Per TOWNSHEND, J.—The question as to the weight to be given to the evidence and the inferences to be drawn from it was for the trial judge, and could only be brought before the Court by appeal.

Per GRAHAM, E.J.—(Who concurred that there was evidence to justify a verdict of guilty) the case was one in which the Court should exercise its power under the Code s. 746 by ordering a new trial.

Per MEAGHER, J.—It was not the intention of Parliament that the remedy by case reserved under the Code s. 743, and the one by application for a new trial, under the Code s. 747, should both be open to the accused at the same time: *The Queen v. McIntyre*, 31 N.S.R. 422.

W. A. Henry, for Crown. *J. J. Power*, for prisoner.

Full Court.] SHAND v. EASTERN CANADA SAVINGS CO. [March 13.
Practice and precedent—Security for costs of appeal ordered to be given by plaintiff in insolvent circumstances.

On an application made by defendants for security for costs of an appeal asserted by plaintiff, it appeared that plaintiff's action had been

dismissed with costs but that no costs had been paid, and that to an execution issued therefor return had been made that plaintiff had no property within the jurisdiction or elsewhere to respond the execution. It also appeared that plaintiff had made an assignment for the general benefit of creditors, and that on an examination before commissioners it was shewn that he had no real or personal property, book debts or assets, that none of his creditors had been paid, and that anything recovered in the action would belong to his creditors.

Held, (following the practice laid down in Chitty's Archbold p. 399) affirming the order made at Chambers, that the case was one in which the plaintiff should be ordered to give security.

A. Whitman, for plaintiff. *R. L. Borden*, Q.C., and *A. E. Silver*, for defendants.

Full Court.] HAMILTON ET AL. v. GRANT ET AL. [March 13.

Railway company — Action against shareholder — Defence of previous transfer of shares to directors — Transfer held valid notwithstanding failure of transferees to register — Decisions under English Companies Act distinguished — Transfer prepared by director assumed to have been in proper form — Remedy against shareholders lost through delay — N.S. Railway Act, R.S., 5th series, c. 53, s. 23, sub-s. 1 — N.S. Companies' Act, 5th series, c. 78 — Acts 1886, c. 155 — Acts 1890, c. 63.

In 1887 H., and others associated with him for that purpose, undertook to buy up a majority of the stock of the S. V. and L. Ry. Co., and entered into an agreement with M. and G. under which the latter were to procure and transfer to them a sufficient amount of stock in the company for that purpose. The stock so acquired and transferred was to become the property of H. and his associates in the proportion of one-fourth each. On September 3rd, 1887, G. received a transfer of 500 shares of stock in the company owned by D., and on the same day these, with other shares held by M., were transferred to the Board of Directors (H. and his associates), and the transfer was approved and accepted by them. Some time subsequently H. sent to G. a transfer to H. and his associates of all the interest of G. in the stock of the company which G. signed and returned. H. acted as president and a director of the company for some years after, and took a chief part in all the meetings and subsequent transactions, and was a party to proceedings taken by the directors and shareholders to borrow money on the security for the franchise of the company. By the act of incorporation of the company (1886, c. 155, s. 4) it was enacted that "the transfer of shares in this company shall be valid and effectual for all purposes from the time such transfer is made and entered in the books of the company." In an action brought by plaintiffs as trustees representing bondholders against the executrix and executor of

G. to recover the sum of \$9,000 alleged to be due by G. in respect of the shares held by him, it appeared that no entry of any transfers, except those to M. and G., was to be found in the books of the company, and there was no proof that any book existed in which such transfers could or should have been entered.

Held. 1. G. having done all that was in his power to make the transfer good and effectual, the irregularities and omissions of H. and his associates—the directors—over whom he had no control, could not so operate as to continue him as a shareholder.

2. The transfer executed by G. having been prepared by H., the president of the company, it would be unreasonable to assume that it was not in proper form.

The provisions of the N.S. Railway Act, R.S., 5th series, c. 53, being materially different from those of the English Companies' Act, there being nothing in the former act to require a similar strict construction as to the liability of a shareholder who was made a bona fide transfer of his shares, and done what he could to make such transfer effectual, the cases decided under the English Act as to transfers of stock are applicable in this province.

Per WEATHERBE, J.—Under the wording of the Railway Act R.S., 5th series, c. 53, s. 23, sub-s. 1, any man who can be said to be the "holder of the stock" is the person liable, and is the only person liable, and there is nothing to prevent a creditor from following the stock into the hands of a stockholder who is not registered.

In 1890 (Acts of 1890, c. 63) H. and his associates procured the passage of an act to amend and consolidate the original act of incorporation and the acts in amendment thereof, under which H. and his associates were incorporated under the same name as in the original act but with different powers and increased capital. By the amended act it was enacted that the company having already organized and gone into operation in accordance with the original act, such organization and operation were thereby confirmed; and all acts and parts of acts inconsistent with the amended act were thereby repealed.

Per TOWNSEND, J.—As the words "organization and operation" would clearly cover the appointments of president and directors who were acting as such by virtue of stock transferred to them at the time in fact if not in law, the provision of the statute would legalize the transfer in question, assuming that the stock had not already been legally transferred. Also, that inasmuch as the effect of the Act of 1890 was to extinguish the company incorporated under the Act of 1886, except in so far as the Act of 1890 specially affected the position and assets of the company. Creditors who had claims against the old company would require to proceed under the provisions of the Act respecting corporations, R.S., 5th series, c. 78, ss. 10, 11, within three years after the dissolution of the corporation, and

that the plaintiffs having failed to do this, lost all rights that they might have had against shareholders in the old company.

R. E. Harris, Q.C., for plaintiffs. J. McGillivray, H. McInnes and H. Mellish, for defendants.

Full Court.]

MOORE v. RITCHIE.

[March 13.

Trespass to land—Interference with dam and flow of break—Evidence of plaintiffs' title held insufficient.

Plaintiffs claimed to be lessees and in possession of a water course running through a pond in the vicinity of the town of L., and as such entitled to the flow of the brook and the use of a dam at the pond to regulate the flow of water in connection with the working of a grist mill, situated upon a lot of land owned by plaintiffs further down the stream. In an action by plaintiffs against defendants, claiming damages for opening the dam and interfering with the flow of water, and an injunction, it appeared that plaintiffs' claim, as lessees, was based upon a resolution passed August 12th, 1895, at a meeting of the "proprietors' committee" of the township of L. There was no evidence to shew who the persons were who called themselves the "proprietors' committee" at that time, nor how, or when, or by what authority the "proprietors' committee" was appointed. The township grant, which bore date Nov. 26, 1764, under which both parties claimed, shewed that the township contained 200 rights or shares of 500 acres each, of which only 157 appeared to have been granted at the time.

It appeared from the grant that, before it was issued, a division was made, but none was proved, and it was impossible to say whether the land covered by the brook passed under the grant or was included in the ungranted shares or rights. Evidence was given, however, to shew that from the first the grantees had assumed to control the management of the brook and that from time to time they had passed resolutions for that purpose, but no authority was shewn for these proceedings and it did not appear that the grantees had any.

Held, assuming that the original grantees had authority to so deal with the brook and pond, that, in the absence of evidence that their rights were transferred to the persons who, in 1895, assumed to exercise such authority, no right or title to the brook, pond, or dam passed to the plaintiffs, as lessees or otherwise, and they must fail in their action.

F. B. Wade, Q.C., and H. A. Lovett, for appellant. J. A. McLean, Q.C., for respondent.

Full Court.]

LEONARD v. SWEET.

[March 13.

Practice and procedure—Paragraphs of reply to grounds of defence struck out at Chambers as tending to prejudice fair trial of action—O. 19, R. 27—Order, on appeal, sustained in part and reversed in part.

Plaintiffs' statement of claim alleged detention by defendants of an engine the property of plaintiffs. In the alternative, plaintiffs alleged detention by defendants of an engine delivered by plaintiffs to F. Under a special agreement that it was to remain the property of plaintiffs until certain promissory notes, etc., given by F. for the price of the engine were paid, none of which had been paid. In further alternative it was alleged that plaintiffs were entitled to the engine in question under a bill of sale given by F. to plaintiffs. Defendants pleaded among other things, that S. & Co. issued a writ of attachment against F. as an absent or absconding debtor, and that the sheriff attached the engine in question as the property of F. Also that S. & Co. recovered judgment against F. in the action brought by them against him, and issued executions thereon, and that the engine was detained under the last of said executions. Plaintiffs replied (4) that when the writ of attachment was issued F. was not an absent or absconding debtor; (5) that the summons and attachment were never personally served upon F., that F. did not owe S. & Co. the whole amount of their judgment, but a much smaller sum; and that the judgment was obtained by S. & Co. in collusion with F.; (6) that the judgment against F. obtained by S. & Co. was paid before the commencement of plaintiffs' action; (7) that since the recovery of the judgment by S. & Co. against F. large sums had been paid by F. which had not been credited thereon; and that in addition to such payments F. gave S. & Co. certain stock as collateral security for all amounts due by him, which stock should have been sold and the price credited upon said judgment, which, with the amounts paid by F., would have fully paid all amounts due under said judgment to S. & Co. Pars. 4, 5, 6 and 7 of plaintiffs' reply having been struck out by the Chambers judge, under O. 19, R. 27, as irrelevant and tending to prejudice, embarrass and delay the fair trial of the action.

Held, that as to pars. 4, 5 and 6 the learned judge was in error, and plaintiffs' appeal from his order should be allowed; but as to paragraph 7 he was right and his order should be sustained.

F. H. Bell, for plaintiffs. *A. MacGillivray* and *F. T. Congdon*, for defendants.

Full Court.]

CITY OF HALIFAX v. FARQUHAR.

[March 17.

Municipal corporation—Action for rates and taxes—Defence of excessive amount—Held question for Assessment Appeal Court—Proof of assessment—Evidence wrongly received—Facts admitted on pleadings.

Defendant was assessed in the City of Halifax for City, Poor, County, and School rates and taxes for the years 1894 and 1895, the property upon

which the rates were assessed being the SS. "Newfoundland," then lying in Halifax harbour, of which defendant was alleged to be owner, and the valuation of which, for the purposes of the assessment, was placed at the sum of \$5,000. Under the provisions of the Halifax City charter, Acts 1891, c. 58, s. 341, a Court is established for the purpose of hearing all appeals from assessments, and is empowered, under subsequent sections of the Act, to determine and hear all objections of ratepayers, who shall have duly appealed, to the valuations or assessments which have been made upon such ratepayers and their properties, and to reduce or increase the valuations, etc. In an action by plaintiff to recover from defendant the amount claimed to be due for rates and taxes, defendant pleaded among other things that at the time of said assessments defendant was not the owner of more than a one-quarter interest in said ship.

Held (following *Town of Westville v. Munro*, 32 N.S.R., p. 54), that defendant having received notice of the assessment, if he was dissatisfied therewith, should have brought the matter before the Assessment Appeal Court, established for that purpose, and, having failed to do so, that the assessment was conclusive, and could not be attacked in an action to recover the amount assessed.

The only evidence before the Court of the assessment and the rate due thereon was the city collector's certificate of taxes unpaid, and sec. 362 of the City charter, which provides that all rates and taxes shall become due the 31st day of May in each year, and that it shall be the duty of the city collector immediately thereafter to take proceedings, etc. There was no evidence to prove the collector's signature to the certificate or that he was collector.

Held, that the paper tendered was wrongly received in evidence. But, nevertheless, that as defendant, in his defence, admitted that he was assessed for the amount claimed, and that the rate alleged to be due on such assessment was correct, it was not necessary for plaintiff to prove the assessment or the rate due thereon.

R. L. Borden, Q.C., for appellant. *W. F. MacCoy*, Q.C., for respondent.

Full Court.]

MCDONALD v. GILLIS.

[March 17.

Promissory note—Joint and several makers—Action against makers jointly—Recovery of judgment against one held a bar to proceedings against the other—Form of action—Amendment—Right to, affected by lapse of time.

The defendants, G. and N., were sued jointly as makers of a note for \$25. The writ which was issued in January, 1885, was served on the defendant N., and the defendant G. accepted service. N. appeared and pleaded, but by arrangement nothing was done in relation to the claim against the defendant G. In November, 1885, N. withdrew his defence

and confessed the action, and final judgment was entered against him, on which some payments were made. In 1899 plaintiff commenced proceedings against the defendant G., who, under an agreement reserving his rights appeared and pleaded.

Held, reversing the judgment of the County Court Judge for District No. 6, that the judgment entered on confession against the defendant N. was an answer to the claim subsequently made against the defendant G. *McLeod v. Power* (1898) 2 Ch. 295, followed.

Held, further, that the action having been brought against defendants as joint debtors only, the position of G. in this suit was not affected by the fact that the note in question was a joint and several one, and that plaintiff in another suit might have some claim against G. alone.

Per MEAGHER, J., dissenting. As the reception of the note was not objected to on the trial, or the existence of the judgment against N. urged as an answer, a stage had been reached when the form of action was not material.

Held, also, that as either objection, if raised upon the trial, could have been cured by amendment, the facts should be looked at rather than the form, and the defendant G. should not be permitted to succeed on a mere technicality.

Per TOWNSHEND, J., concurring. G. could not succeed without an amendment and no amendment should be permitted after the lapse of fifteen years.

R. L. Borden, Q.C., and J. A. Chisholm, for appellant. W. F. O'Connor, for respondent.

Full Court.]

MCKENZIE v. ROSS.

[March 17.

Action to have property in name of defendant declared vested in plaintiffs as assignees of party advancing purchase money—Proof that money was mere advance and that defendant acted independently—Doctrine of resulting trust held inapplicable—Case withdrawn from jury—Waiver.

Plaintiffs as assignees of M. sought to obtain a declaration that certain lands held in the name of defendant were at the time of the assignment the property of M. and by reason of the assignment, became vested in the plaintiffs.

The evidence shewed that the money required by defendant for the purchase of the properties in question was obtained from M., but that M. had nothing to do with any of the purchases except to advance the money to defendant by whom the negotiations were conducted, and in whose name the deeds were taken and recorded, and who in all cases acted independently of M. in negotiating for and acquiring the properties from the respective owners.

Held, 1. The doctrine of resulting trusts was not applicable, and there being no issue of fact for the jury on this phase of the case the trial judge was justified in withdrawing it from them.

2. The trial judge having at the close of the trial announced his intention of withdrawing the case from the jury counsel for plaintiffs should at that time have indicated the facts or issues that they wished the jury to pass upon, and, having neglected to do so, it was now too late for them to object.

3. The objection was without merit as the jury was applied for by defendant and not by plaintiffs.

A. Drysdale, Q.C., for appellant. *H. Mellish*, for respondent.

Full Court.] *MESSINGER v. THE TOWN OF BRIDGETOWN.* [July 18.

Municipal corporation—Action claiming damages for obstruction in highway—Contributory negligence—Defence of sustained—Improper rejection of evidence—New trial refused where no substantial wrong or miscarriage—O. 37, R. 6.

An excavation made by defendants in the highway for the purpose of laying a small pipe, when filled in, left a mound of earth from four to five feet in width at the base, and from eight to nine inches above the surface.

Plaintiff's horse, in passing over the place where the pipe had been laid, and the earth filled in, stumbled and fell, throwing plaintiff out, and causing him to sustain serious bodily injury.

In an action by plaintiff claiming damages the evidence shewed that plaintiff had driven over the place where the accident occurred, in daylight, a few hours before, that in returning, at about ten o'clock at night, he was driving at the rate of seven miles an hour, that his horse was seventeen years old, and was lame at times, that it had been known to stumble, that it was without shoes at the time of the accident, and that the springs of plaintiff's waggon were in a defective condition.

Held, that, on the whole case, the earth construction was not negligently made, and was not a more serious obstruction than was usual on such roads at such places, and that the stumbling was due to plaintiff not using proper care with this horse and carriage in approaching, at that time of the night, a place which he had seen before.

On the trial, evidence having been given of the individual opinion of plaintiff's neighbours as to his general reputation for veracity, defendant's counsel proposed to ask the witness the question "whose opinion do you know?" The evidence having been excluded,

Held, that the question should not have been disallowed.

Held, notwithstanding, that as, assuming plaintiff's testimony to be perfectly true, no case was made out against the defendant, there was no necessity for sending the case back for a new trial, for rejection of evidence, there having been no substantial wrong or miscarriage, within O. 37, R. 6.

Per *WEATHERBE, J.* As defendant had undertaken to support the exclusion of evidence that was clearly admissible there should be no costs.

W. E. Roscoe, Q.C., for appellant. *J. J. Ritchie*, Q.C., for respondent.

Full Court.] RE ESTATE OF JOHN FARQUHARSON. [March 18.

Will—Proof in solemn form—Insane delusion—Where delusion established burden to shew lucid interval on party setting up will—Interested party—Evidence of corroboration—Witnesses and Evidence Act, R.S., c. 107, s. 17, not applicable.

In March, 1897, testator made a will revoking a prior will made in 1890, materially reducing the bequests made by the prior will to his wife and son, and giving away large portions of his estate to collateral relatives.

The evidence shewed that at the time of the making of the second will defendant was suffering from certain insane delusions as to the relations existing between his wife and son, and that the disposition of his estate made by such will was affected by such delusions.

Held, that the decree of the Surrogate Judge of Probate, on petition for proof in solemn form, admitting the second will to probate, must be set aside, and the will declared inoperative and void.

Per TOWNSHEND, J., GRAHAM, E. J. concurring. The existence of the delusion being established, the burden rested upon the parties setting up the second will to shew that it was made during lucid interval.

Held, also, that the objection that important testimony had been given by the wife and son, who were interested parties, lost the force that it would otherwise have had, where their testimony was corroborated in all essential particulars by disinterested witnesses.

Held, also, that the provision of the Witnesses and Evidence Act, R.S. c. 107, s. 17, excluding parties from giving evidence of dealings, transactions, or agreements with the deceased on the trial of any issue joined, or on any inquiry arising in any suit, action or other proceeding in any court of justice, etc., has no application to any investigation of this kind as to questions of testamentary capacity.

C. S. Harrington, Q.C., for appellant. W. B. A. Ritchie, Q.C., for respondent.

Province of New Brunswick.

SUPREME COURT.

In Equity, Barker, J.] LAWTON SAW CO. v. MACHUM.

Partnership—Agreement—Construction—Losses—Contribution inter se.

By an agreement between plaintiffs and defendant it was provided that the defendant, who was carrying on the business of manufacturing wire fencing, should furnish machines, in which he had patent rights, for the purpose of carrying on the business of manufacturing and selling wire

fencing; that he should devote his time and energy in furthering the interests of the business; that the machines and patent rights therein should be security for money advanced by the plaintiffs; that the plaintiffs should advance to the defendant \$500, purchase wire needed for manufacturing, and pay wages, etc., in consideration of a commission of five per cent. on all purchases and advances; that the plaintiffs should furnish space on their premises for the business at a yearly rent; that the defendant should receive a weekly salary; that the plaintiffs should attend to the office work of the business, for which they should be paid a weekly sum; that the net profits of the business should be divided; that the business should be conducted under a company name, and that the agreement should continue for one year, when plaintiffs could purchase a half interest in the business and patent rights of the defendant or continue the business for a further term. The business resulted in a loss.

Held, that the parties were partners inter se, and should share equally in the losses of the business.

J. D. Hazen, Q.C., for plaintiffs. *A. I. Trueman*, Q.C., and *E. R. Chapman*, for defendant.

In Equity, Barker, J.] BLACK v. MOORE.

Fraudulent conveyance—Statute 13 Eliz., c. 5—Foreign assignment of personal property in New Brunswick—"Mobilier sequuntur personam"—Conflict of laws—Onus of proof—Garnishee—Equitable execution.

A share in the annual income of an estate in Ireland, payable under a will through the hands of an executor living in New Brunswick, to the beneficiary living and domiciled in Massachusetts, was assigned by the beneficiary by assignment executed in Massachusetts to trustee in trust, first, to maintain the assignor and his family, and secondly to pay his creditors a limited sum. In a suit in this province to set aside the assignment as fraudulent and void against a judgment creditor of the assignor, under the statute 13 Eliz., c. 5.

Held, 1. The validity of the assignment should be determined by the *lex domicilii* of the assignor;

2. Assuming the validity of the assignment should be determined by the law of Massachusetts, the onus of proving that the assignment was invalid by that law was upon the defendant, and that in the absence of such proof it must be assumed that the law of Massachusetts was the same as that of New Brunswick;

3. As the money coming into the hands of the executor was liable to attachment under 45 Vict., c. 17, s. 21, or to equitable execution, the plaintiff was prejudiced by the assignment within the statute, 13 Eliz., c. 5.

F. St. John Bliss, for plaintiff. *G. W. Allen*, Q.C., for defendants.

IN RE WIGGINS' ESTATE.

Trustee—Commission—Personal estate—Income—Investments.

No fixed rule can be laid down as to the commission trustees will be allowed by the court, as each case must be governed by its own circumstances, and by a consideration of the trouble experienced in the management of the estate.

Where trustees of an estate consisting of stocks and mortgages received under the deed of trust a commission of 5 per cent. on income, a commission on the estate was refused, but a commission of one per cent. was allowed on investments made by them.

A. O. Earle, Q.C., for trustees. G. C. Coster, for estate.

IN RE STACKHOUSE.

Drunkard—Allowance to family—Payments out of principal—53 Vict., c. 4, s. 276.

Where the estate of a drunkard did not yield sufficient income to maintain him, and to partly maintain his family, the court under Act 53 Vict., c. 4, s. 276, ordered a yearly sum to be paid out of principal by the drunkard's committee to the family for their support.

J. B. M. Baxter, for committee. W. W. Allen, Q.C., for family.

Province of Manitoba.

QUEEN'S BENCH.

Dubuc, J.]

STOBART v. FORBES

[Oct. 23.

Company—Assignment of chose in action—Trading corporation acting as trustee—Assignments Act, R. S. M. c. 7, s. 3—Objections by debtor to assignment.

Two objections to the plaintiffs' claim were raised by the defendant;

(1) That it included the claims of other parties which had been assigned to the plaintiffs merely for the purpose of collection and that the plaintiffs were not beneficially entitled thereto or interested therein.

(2) That the plaintiffs, being a company created under the Manitoba Joint Stock Companies Act, had no power to take such assignments and bring suit thereon.

Held, 1. Following *Mussen v. The Great N. W. C. Ry. Co.*, 12 M. R. 594, that, under The Assignments Act, R.S.M. c. 7, s. 3, the first objection could not be sustained.

2. A trading company created by letters patent under the Manitoba Joint Stock Companies Act has power to take an assignment of a chose in action and hold and collect it by suit for the benefit of the assigner. *In re Rockwood, etc., Agricultural Society*, 12 M. R. 655; *The Queen v. Reid*, 5 Q.B.D. 483; and, *Ashbury Railway Carriage Company v. Riche*, L.R. 7 H.L. 653, distinguished.

3. The defendant, having no interest in the assignments and being no way prejudiced by them, could not raise any objection to them. *Walker v. Bradford Old Bank (Limited)*, 12 Q.B.D. s. 11, followed.

Howell, Q.C., for plaintiffs. *Crawford*, Q.C., for defendant.

Province of British Columbia.

SUPREME COURT.

Full Court.]

IN RE COWAN.

[March 19.

Practice—Costs—Taxation of—Solicitor and client.

Appeal from MARTIN, J., dismissing a summons for a review of the taxation by the District Registrar at Vancouver of a bill of costs rendered to John MacQuillan by Mr. G. H. Cowan, a barrister and solicitor. Item 45 in the bill of costs "Counsel fee perusing same (*i.e.*, statement of defence) . . . \$5.00," was objected to as being excessive.

Held, dismissing the appeal, that a charge in a bill of costs although not justified by the item under which it is framed may nevertheless be allowed if it can be sustained under any other item of tariff. The charge in question although not justified under item 147 of the tariff could be sustained under item 229.

Duncan, for appellant. *Kappele*, for respondent.

McColl, C.J.]

[June 11.

YORKSHIRE GUARANTEE CORPORATION *v.* EDMONDS.

Land Registry Act—Registered judgment—Whether mortgage given by debtor affected by or not—C.S.B.C. 1888, c. 67, s. 26, 27, 33 and 34, and c. 42, s. 32.

This was an action for foreclosure. None of the defendants contested the action save the Bank of British Columbia. The question to be decided

was as to the priority of the two claimants on part of the lands mortgaged. The plaintiffs claimed by virtue of a mortgage executed by the defendant, H. L. Edmonds, on 6th March, 1893. Application for registration of same was filed on March 7th, 1893, at 11.40 a.m., and the mortgage was registered on 6th July, 1894. The defendants, the Bank of British Columbia, claimed by virtue of a judgment obtained by them against the said defendant, H. L. Edmonds. Application for registration of same was filed in the Land Registry Office on 7th March, 1893, at 11.10, a.m., and the judgment was registered on 27th March, 1893. Execution issued on this judgment and on 14th December, 1894, the sheriff sold, at public auction, the land in question to E. A. Wyld, an officer of the Bank of British Columbia, and executed a conveyance to him, and the said Wyld thereupon conveyed the land to the Bank of British Columbia, and the Registrar issued a certificate of title to the Bank free from all encumbrances.

Held, that a registered judgment binds only the interest of the debtor existing at the time of registration, and therefore cannot affect a mortgage already given by the debtor, although such mortgage is not registered before the judgment. Judgment for plaintiffs against the Bank with costs.

L. G. McPhillips, Q.C., for plaintiffs. *Davis*, Q.C., for Bank of British Columbia.

Book Reviews.

An Exposition of the Principles of Estoppel by misrepresentation, by John S. Ewart, Q.C., Winnipeg, Manitoba, Canada. Toronto: The Carswell Company, Limited, Law Publishers, 1900.

The writer claims as the chief characteristic of the above work (1) a completer and more scientific analysis and classification of estoppel; (2) a clearer apprehension and appreciation therefore of the basis and methods of estoppel; and (3) a successful substitution in various departments of the law of the principles of estoppel for others now in vogue, and he holds the view that much perplexity has arisen from the absence of the distinction which he makes by dividing the subject into these two most obvious classes, namely estoppel by personal misrepresentation and estoppel by assisted misrepresentation.

The writer's method is to investigate and establish the essential requisites of estoppel by misrepresentation so as to apply them to all the departments of the law in which estoppel operates. He then discusses and amplifies the rule laid down in the old case of *Lickbarrow v. Mason* (1787) 2 T. R. 63 which lays down the broad principle that whenever one or two innocent persons must suffer by an act of a third, he who enables such third person to occasion the loss must sustain it. In the next two chapters he discusses the nature and effect of estoppel and the relation of estoppel

to deceit. The remainder of the book is devoted to the application of these principles to different forms of property and the various department of the law under the following heads :—Ostensible ownership and agency—Matters connected with land, divided into legal estate, possession of the deeds, *qui prior est tempore potior est jure*—Matter connected with goods, in relation to their possession, documents of title and legislation—Choses in action—Execution of documents—Principal and agent—Partnership.

In the above scheme it will be seen that Mr. Ewart has laid down a scientific and certainly an entirely new arrangement of the doctrine treated of. His treatment of it shews much originality of thought, a clever handling of a very difficult subject as well as careful research. His style is all his own, and in its freshness and individuality smacks of the Prairie Province, which he has made his home. His work will be a valuable addition to the lawyer's library.

The table of contents is exhaustive and satisfactory, but the index not quite up to the mark.

Flotsam and Jetsam.

UNITED STATES DECISIONS.

ELECTRIC WIRES — NEGLIGENCE. — In *Brush Electric Light and Power Co. v. Lefevre*, 67 S.W. Rep. 640, decided by the Supreme Court of Texas, it appeared that two exposed electric light wires were stretched across a street, about sixteen feet above the pavement and about two feet over the top of a wooden awning, containing no railings, and not used as a place of resort. A person went upon such an awning to raise the wires so that he could pass thereunder a house he was moving, and while there lost his footing, and, to steady himself, grasped the wires, and was killed. It was held that as the top of the awning was not a place where people could be expected to resort, and the wires were not improperly placed with respect to the surface of the street, no negligence could be imputed to the lighting company, and a verdict against the company was set aside.

A railroad employee injured through the negligence of a co-employee is held, in *Smith v. St. Louis & S. F. R. Co.* (Mo.), 48 L.R.A. 368, to have no right of action because of negligence in employing him, if his negligence was not with respect to acts for the performance of which he was employed. With this case there is a review of the decisions as to the duty of a master with respect to the employment of his servants.

The servant of a truckman who is sent by his master, who pays him, with a horse to a warehouse, to use the horse in operating tackle for hoisting goods, is held, in *Murray v. Dwight* (N.Y.), 48 L.R.A. 673, not to be a fellow servant of the warehouseman's servants, by whose negligence he is injured when putting the blocks and tackle in place, although he works under the direction of the warehouseman's foreman.

ANALYTICAL INDEX

of the Contents of this Volume.

Accident—

See Lord Campbell's Act—Negligence—Municipal Law—Parent and child—
Railway Company—Street Railway.

Account—

Exceeding scope of reference, 374
See Tenant for life.

Action—

Premature—Effect of, 159
For stopping supply of gas, 59
For damages for invoking Divine vengeance, 392
Locality of debt—Foreign debt, 413
For declaration as to title of land, 721

Accretion—

See Deed.

Administration—

Solicitor executor—Costs and remuneration, 136
Annuity—Appropriation of capital to purchase of, 209
Married woman—Restraint on anticipation, 209
Trustee carrying on trust business—Tort by—Indemnity, 221
Misconduct of—Account against, 224
Laches—Refunding of estate after administration by court, 285
De bonis non—Grant to beneficiary as to property—Legal estate outstanding, 296
Disappearance of administrator—Revocation of grant, 481
With will annexed—Next of kin out of jurisdiction, assets and some beneficiaries within—Grant to stranger, 481.
Discretion to refuse order, 640
Fund carried to separate account—Assignment, 672
See Executor and administrator—Married woman.

Advocates—

In Quebec—Bar discipline, 22

Agent—

See Principal and agent.

Agricultural Society—

See Company.

Alimony—

Desertion—Offer to take wife back, 134
See Divorce.

Annuity—

See Administration—Limitation of actions—Will, construction of.

Appeal—

Abandonment—Re-instalment—Grounds for appeal, 164
Leave to adduce evidence after judgment in, 570
Motion to quash by-law—Leave for further appeal, 594
Cross appeal, 664
Stay of reference pending, 665

Appeal—Continued.

- Special leave to—In forma pauperis, 700
- To Supreme Court of Canada.
 - Previous appeal to Court of Appeal—Security for costs, 166
 - Stay of proceedings—Payment out of court, 166
 - Final judgment—Only one of several points decided, 378
 - From highest court of last resort in Ontario, 324, 362, 446
 - Where title to land in question—Costs, 336, 379
 - Right of way, 379
 - Question of fact—When bound by findings in court below, 336
 - Amount in dispute—Incidental matters, 337, 674, 675
 - Cancelling appointment of tutor, 379
 - Reference to Master under Vendor and purchasers Act, 380
 - Action for wife in Quebec for separation, 448
 - Action for penalties—Act unconstitutional, 451
- To Court of Appeal, (Ont.)—
 - Leave—Practical question only, 344
- From County Court.
 - Jurisdiction, 63
 - To Divisional Court—Time—Re-settling judgment, 66
 - From jury trial, 160
 - For costs—Principle involved—Costs, 160
 - Right to, considered, 217
 - Inability of courts to extend time—Striking out, 233
- British Columbia.
 - To Supreme Court of—Motion refused—36

Appearance—

See Parties.

Application of payments—

See Appropriation of payments—Principal and surety.

Appointment—

See Power of appointment.

Apportionment—

See Landlord and tenant.

Apprentice—

Unreasonable conditions—Liability of surety, 238

Appropriation of payments—

Banking account—Following fund—Rule in Clayton's case, 51, 620

Arbitration—

- Arbitrator—Omission to take oath, 66
- Powers of, 66
- Jurisdiction of, 672
- Award—Setting aside—Time—Publication, 66
- Extending time for making, 584
- Of lump sum, 672
- Agreement for—Staying proceedings, 284
- Dispute between master and servant—Wrongful dismissal, 284
- Costs of reference—Scale of costs, 442
- Evidence taken on matters not returned, 672

Armour, C.J.—

Appointed to Court of Appeal, 396, 433

Arrest—

- Intent to leave Province—Intent to defraud, 101
- Affidavit for ca. re.—Irregularity—Waiver, 142
- Application for discharge—Onus—Intent to defraud—Former absconding, 423

Assignments and preferences—

Sale of assets—Extinguishment of debt—Composition—Release, 449
Promise to give security—Presumption—Rebuttal—Payment, 458
Transfer of security—Cheque—Promissory notes, 458
Compromise—Secret agreement—Bribery, 500
Secret agreement—Voluntary payments—Assignee—Privity, 641
See Insolvency.

Assignment f.b.o.c.—

Examination of assignor—Unsatisfactory answers, 384

Assessment—

For block pavement—Repairs, 28
Street railways—Rails, poles, roadbed, etc., 128
Public hospitals, 307
Appeal from—Adding items illegal, 128
Assessment Court, N.S.—Evidence, 719
Domicile—Change of, 212
Bonus by-law—Special rate—Duty of clerk—Collector's roll, 596
Sale of debentures—Failure of scheme, 596
Exemptions by way of bonus to C.P.R. Co., 674
School taxes included in "All municipal taxes, 674
Taxes—Collection of
Arrears—Goods on premises "purchased" from owner, 29, 451
Uncollectable—Failure to distrain—Enforcing payment in subsequent year, 448
Sale for—Imperfect description, 711
Execution for—Direction by sec. treas.—Municipality liable for false arrest, 316
See Municipal law.

Attachment of debts—

Costs—Money paid into court before judgment, 70
Claim under fire policy before proofs of loss—Option to replace destroyed property, 425
Salary of municipal officers—Advances, 599
Money to remain in court till new action, 647
Fraud—Issue—Amount in controversy, 713
County Court jurisdiction—Residence of garnishee, 713
See Lunatic—Receiver.

Auctioneer—

See Municipal law.

Audit—

Finality of—Fraud, 55

Australia—

Union of provinces in, discussed, 435

Ball—

Contract to indemnify, 148

Bankruptcy—

See Insolvency.

Banks and banking—

Collateral security—Crediting proceeds—Suspense account, 39
Appropriation of payments, 51
Deposit—Right to set off—Ranking on estate for balance, 504
Crossed cheque—Payment—Liability, 701
Pass book—Donatio mortis causa, 712

Bedding—

See Landlord and tenant.

Bench and bar—

- Organization of Yukon Territory, 1
- Women as prosecuting attorneys, 1
- Discipline of the bar in Quebec, 22
- Portrait of Sir C. H. Tupper and sketch of his life, 41
- Changes in the English Bench, 42, 361
- The longest practising solicitor, 43
- County Court, Ontario—Judicial appointments, 146
- Speculative suits, 147
- Judges employed in other than judicial work, 177
- Professional costume, 301, 476, 578
- Retirement of Burton, C.J., and promotion of Armour, C.J. Falconbridge, J., 396, 433
- Judicial appointments—Duty of Government in relation to, 475, 650, 689
- Unjust strictures on the profession, 517, 610
- Vacancy in Ontario Bench, 609
- An incompetent Law Society, 677
- Refuse no man's cause, 577
- Judicial changes in England, 583, 649
- Appointment of G. F. Gregory and J. E. Robidoux to the Bench, 583
- Legal men for legal offices, 689

Benevolent Society—

See Insurance, life.

Bill of lading—

Description of goods—Marked "as in the margin"—Mistake, 408

Bicycle—

- Is a "carriage" liable to toll, 443
- Not so under statute requiring highway to be kept in repair, 476
- Right of way to other vehicles, 511

Bill of sale—

See Chattel mortgage.

Bills and notes—

- Construction of order—Acceptance, 138
- Material alteration—Correction of error, 680
- Joint and several makers—Judgment against one, 720
- See Assignments and preferences—Banks and banking—Executor and administrator.

Blackmailing—

Meaning of, 603

Bonus—

See Assessment—Company.

Breach of trust—

See Trusts and trustees.

Book reviews—

- The Criminal Code, by James Crankshaw, 39
- Conditional sales, by W. J. Tremeeear, 40
- Taxes and assessment law, by H. E. F. Caston, 40
- Limitation of actions against trustees, etc., by F. A. Anglin, 144
- The Indian review, 176
- A treatise on evidence, by J. B. Thayer, 319
- Greenleaf on evidence, by Wigmore & Harriman, 358
- The law as to electric lighting and energy, by J. S. Will, 359
- Wit and humor of bench and bar, by Marshal Brown, 360
- Municipal and assessment guide, by J. J. Kehoe, 360
- The law of bailments, by Edward Beale, 380
- The interpretation of wills and settlements, by Underhill & Strahan, 389

Book Reviews—Continued.

- The Law Quarterly Review, 390-510
- Index of books at Osgoode Hall, by W. G. Eakins, 390
- Law and practice in accident cases, by C. C. Black, 432
- The Division Court Act, by Bicknell & Seager, 471
- Broom's legal maxims, by Manisty and Chitty, 608
- The Law Magazine and Review, 608
- Attachment of debts, by Michael Cababe, 648
- A treatise on electric law, by Joseph A. Joyce, 687

British North America Act—

- Coal Mine Regulation Act—Chinaman, 59
- Trading stamp ultra vires of Provincial Legislature, 468

Broker—

- See Principal and agent—Stock broker.

Building contract—

- See Contract.

Building restriction—

- Number of houses on estate, 367

Burton, C.J.—

- Retirement of, 396

By-law—

- See Municipal law.

Cablegram—

- See Contract.

Canada Temperance Act—

- Search warrant—Destruction of liquor, 141
- Election—Irregularities—Scrutiny, 315
- Construction—Several agencies, 377

Caveat venditor—

- The law as to discussed, 399

Certiorari—

- See Master and Servant Act.

Charge on land—

- Express trust—Two sums secured by same term, 208
- See Mortgage.

Charging order—

- Discharging ex parte order—Laches, 702

Charter—

- See Company.

Charter party—

- See Maritime law.

Chattel mortgage—

- Covenant by mortgagor as to user of goods, 168
- Description of goods, 204
- Interest on debt after sale of property, 300
- Registration—Grantor using assumed name, 702
- See Hire receipt.

Cheque—

- See Banks and banking.

Child—

- See Parent and child.

Chinamen—

Statutory prohibition affecting, 59

Chose in action—

Assignment of debt—Absolute or partial, 84

Church—

See Religious institutions.

Collateral negligence—

See Negligence.

Collateral security—

See Banks and banking.

Collection Act, N.S.—

Order to assign—Tool of trade, 573

Collision—

See Maritime law.

Commission—

See Executor and administrator—Principal and agent—Vendor and purchaser.

Commission to take evidence—

See Evidence.

Common carriers—

Right to passengers to carry small parcels of merchandise, 648

Company—

Procuring charter for—Dominion and Ontario procedure contrasted, 3

Promoter also vendor, 16

Secret profits by, 492

Directors—Misrepresentation in prospectus, 20, 368, 483

Arrears of salary to president have priority over general creditors, 24

Dividends paid out of capital—Recovery, 86

Illegal voting of money to officers, 238

Fraudulent prospectus, 326

Fiduciary character—Contracts with company—Profit, 484

Special arrangement as to calls—Directors using powers for personal benefit, 590

Quorum—Validity of action by, 629

Improper allotment of shares to, at under value—Measure of damages, 665

Shares issued as fully paid—Sufficiency of contract, 19

Articles purporting to deprive shareholders of statutory provisions, 299

Stock subscription—Allotment, 487

Power of agricultural society to borrow on mortgage—Ultra vires, 35

Share certificates—Duty of directors as to—Estoppel, 489

New shares and bonuses—Capital or income, 107, 157

Calls on forfeited shares, 662

Judgment creditors rights to execution v. shareholders for unpaid calls, 241

Action against—Parties—Fraudulent prospectus—Company and directors joined as defendants, 326

Rescission of contract to take shares, 331

Notice of meeting where shareholder dead—Forfeiture of shares, 482

Transfer of debentures—Registration, 923

Judgment against—Action against shareholder—Transfer of shares, 675

Right of stockholder to inspect books, 688

Trading corporation—Assignment of chose in action, 725

Winding up—

Contributory—Mutual insurance company limited by guarantee, 54

Creditor's petition—Discretion, 587

Fraudulent preference by company, 91

Voluntary winding up—Liquidator—Appointment, 366

Company—Continued.

Receiver appointed by debenture holders—Surplus—Rights of liquidator, 369

Proving claim for taxes and water rate, 383

Mortgage to creditor—Setting aside, 459

See Railway company—Real Property Act (Man).

Condition precedent—

See Contract—Insurance, life.

Conditional sale—

See Hire receipt.

Conflict of laws—

Lex loci—Locus solutionis—Contract to be performed in different countries, 298

Foreign assignment—Mobilia sequuntur personam—Onus probandi, 724

See Marriage.

Constitutional law—

See B.N.A. Act—Conflict of laws—Yukon Territory—Crown lands—Railway company.

Contempt of court—

Nature of offence and how to be treated, 58, 94

Innocent loan of offensive paper, 58, 94

Scurrilous abuse of judge as such, 441

Continuing offence—

Under Municipal by-law, 227

Contraband of war—

Subject discussed, 73

Contribution—

See Partnership.

Conversion—

See Trover.

Conviction—

See Criminal law.

Contract—

Agreement for share of profits, 55

Concealment of identity of party to—Fraud—Repudiation, 85

Breach—Condition precedent—Divisible contract, 67

Inability to perform, 305

Agreement not to practice medicine—Damages—Injunction, 420

Certificate of engineer—When contractor bound by, 123

Guarantee as to efficiency of article supplied, 130

Building—Sub-contractor—Authority to agent—Ratification, 158

Erection of town hall—Reference—Proof of by-law, 338

Restrictive covenant, 367

Acceptance of offer by post, 224

Withdrawal before, 224

Written—Parol evidence to vary, 438, 645

Need of corporate seal, 639

Place of performance, 298, 422

Cablegram—Contract in cypher—Onus probandi, 375

Construction—Extrinsic evidence, 375

Lump sum—Non-performance—Part performance—Variation, 376

Agents authority—Ratification, 376

Parol—Evidence, 379

To load "a cargo of say about 1800 tons"—Charter party, 407

Sale of lumber—Inspection, 416

Manufacture and sale of chattels—Breach—Damages, 418

Contract—Continued.

- Offer and acceptance—Telegrams—Completion—Mutuality, 450
- Rectification—Partnership—Construction, 469
- Use of race track—Lease or license—Forfeiture, 501
- As to quantity of material to be delivered, 511
- Impossibility of performance—Implied condition—Damage, 586
- Statutory confirmation of, 668
- To give first refusal of land—Notice, 668
- See* Covenant—Mistake—Patent of invention—Principal and agent—Restraint of trade—Sale of goods—Vendor and purchaser.

Copyright—

- Newspaper report of speech, 93
- Perforated music sheet for organ, 207
- Literary and artistic works, 659, 710
- See* Costs.

Correspondence—

- The Succession Duty Act, 156
- Professional costume, 301
- Judicial sentences, 334
- Supreme Court of Appeals, 446
- Notice to municipalities in accident cases, 630
- Law reform, 631, 703

Corporation—

- See* Company—Malicious prosecution

Costs—

- Appeal as to—Discretion—Practice, 18, 161
- Consent judgment—Infringement of copyright—Payment into court, 168
- Slander—Verdict for \$1, 315
- Costs in the cause—Meaning of, 598, 600
 - Discretion of trial judge, 598, 600
- Scale of—County Court jurisdiction—A certain amount, 341
 - Payment into court—Sum within competence of Division Court, 457
- Of order of revivor, 385
- Of reference to arbitration—Scale, 442
- Separate defences in probate action, 445
- Debenture holders' action, 486
- Agency—Terms to foreign solicitor, 172
- Taxation at instance of cestui que trust, 492
 - Bill paid by trustees more than twelve months, 492
 - No appeal from, of mortgagee's power of sale costs, 599
 - Translation of foreign documents, 628
 - Continuous dealings—Payment, 679
 - Unsigned bills, 679
 - Affidavits—Irregular filing, 710
 - Charge justifiable though under wrong item in tariff, 726
- Security for—Residence out of Ontario, 98
 - Temporary residence within province, 139, 686
 - Signer resident abroad claiming fund in court, 366
 - Of appeal—Practice, 173, 388
 - Appeal to Division Court, 312
 - Extra provincial company, 607
 - Power of judge to extend time for giving, 685
 - Affidavit for, 422, 709
 - Insolvent plaintiff, 715
- See* Arbitration—Counterclaim—County Courts—Drainage Act—Solicitor—Will

County—

- See* Riot.

County Courts—

British Columbia—Judge sitting in county other than his own, 247
Manitoba—Appeal from—Amendment—Final order, 32
Ontario—Scale of costs—Defence arising after action, 167
Ascertaining amount, 341
See Attachment of debts.

Covenant—

Tied public house—Mortgage—Assign—Under lease, 221
Restrictive—Building restriction, 366
See Contract.

Counterclaim—

Relief obtainable without cross action—Set off—Costs, 311, 385
Set up by reply, 569
See Landlord and tenant.

Criminal justice—

Speedy administration of, in Ontario, 323

Criminal law—

Theft—Evidence—Withdrawing case from jury, 33
Bail—Indemnity—Illegality of contract, 148
Constables' services and expenses, 159
Obtaining and paying for evidence, 159
Several convictions—Separate rules, 169
"Accuses" in Crim. Code—Information, 312
Manslaughter—Negligence by company causing death, 317, 470
Judicial sentences—Apportionment of, 334
Conviction—Certiorari—Amendment, 453
Under Indian Act, 453
"Grievous bodily harm" includes injuries resulting in death, 470
Evidence—Question for trial judge, 715
Joint remedy by case reserved and new trial, 715
See Gaming and wagering—General Sessions—Summary conviction—Theft
—Trespass.

Crown—

Action between subjects affecting rights of, 205
Right of Attorney-General to restrain action—Public harbour, 388
Expropriation for canal purposes—Access—Damages—Compensation, 636
See Ferry—Highway—Public works—Real Property Act (Man.)—Receiver—
Timber licenses.

Crown lands—

Petition of right—Subsidy to Railway Company, 174

Customs—

See Trade custom.

Customs Act—

Penalties—Jurisdiction of Exchequer Court, 382

Damages—

See Husband and wife—Libel and slander—Negligence—Parent and child.

Debt—

See Action.

Deed—

Construction—Accretion of gravel, 714
See Vendor and purchaser.

Delivery—

See Sale of goods.

Devolution of Estates—

Vendor and purchaser—Title—Executor, 149

Caution—"In the hands of" executor, 215

Payment of debts—Distinction between real and personal property, 678

Director—

See Company.

Discovery—

Examination for—Practice, 83

Disclosing case, 129

Negligence—Railway company, 163

Action for account, 314

Officer of company, 588

Defamation—Disclosure of immoral acts, 713

Affidavit of documents—Sufficing of description—Privilege, 247

Privilege—Production—Photographs, 357

Particulars, 364

Solicitor and client communications, 444

Bill of costs, 666

Dismissing action—

See Practice.

Distress—

See Landlord and tenant.

District courts—

See Unorganized territory.

Ditches and watercourses—

Award—Engineers' appointment, 135

Revocation—Notice—Jurisdiction—Estoppel, 135

Municipal corporation is "owner"—Compensation, 418

See Watercourse.

Dividend—

See Companies.

Division Court—

Committal of debtor—Non-production—Mandamus, 68

Certiorari—Discretion—Res judicata, 101

Adjournment if costs paid in ten days, otherwise judgment, 385

New trial—Motion for—Commencement of fourteen days, 385

In unorganized territories, 385

Amendment at trial, 456

Endorsement on summons beyond jurisdiction, 456

Divorce—

Foreign judgment of—Alimony—Domicile, 65

Jurisdiction—Record—Lands in Ontario, 65

Domicile—

Matrimonial—International law, 283

Change of—Movable goods—French law, 283

Foreign assignment of personal property in N.B.—*Mobilia sequuntur personum*, 724

See Assessment—Divorce—International law—Lunatic—Power of appointment—Will.

Donatio Mortis Causa—

Delivery to third person—Evidence, 202

Banker's pass book, 712

Dower—

Covenant in separation deed to release, 451

Drainage Act—

- Engineer's report—Amendment—Referee, 124, 310
- Natural watercourse, 310
- Petition for—Qualification of petitioner—Farmers' sons, 707
- Appeal—Jurisdiction, 124
- Jurisdiction of local master, 594
- Scale of costs, 158, 163, 457

Drunkard—

- Allowance to family in N.B., 725

Easement—

- Severance of possession on sale of land—Rights of purchasers, 302
- Use of for forty years—Way—Payment for use of—Prescription, 413
- See* Mortgage.

Editorials—

- Liability for funeral expenses, 1
- Insurance against accident, 2
- Dominion or Ontario charter, 3
- Collateral negligence, 6
- Sir Charles Hibbert Tupper, Q.C., 41
- Judicial changes in England, 42, 361, 583, 649
- Changes in the Canadian bench, 146, 396, 433, 583
- Succession duties and legacies, 42
- Long lived lawyers, 43
- The lawyer, his client and country, 43
- Legal education, 44
- Proceedings by quo warranto, 45
- Moneys in court, 73
- Contraband and the American Civil War cases, 73
- Death of Judge Senkler, 105
- The composition of Ontario Divisional Courts, 106
- The unification of the Empire, 106
- New shares and bonuses - Capital or income 107
- Matthew Wilson, Q.C., 145
- Effect of frauds on third parties, 146
- Damages for negligence, 147
- Judges doing outside work, 177, 363
- Negligence in relation to privity of contract, 178
- Appeals from County Courts (Ontario), 217
- Statutory rights of beneficiaries of insurance policies, 249
- Notice of accidents to municipalities, 289, 609
- Personal liability of mortgagors, 289
- Sir John Hawkins Hagarty, D.C.L., 290
- Outrage on the Welland Canal, 292
- E. F. B. Johnston, Q.C., 321
- Administration of criminal justice in Ontario, 323
- Supreme Court practice, 324, 362
- Record of judicial sentences, 361
- Hon. David Mills, Q.C., 393
- Reprint of English reports, 398
- Caveat venditor, 399
- Expert evidence, 433
- Ecclesiastical courts and the marriage laws, 434
- The Commonwealth of Australia, 435
- E. L. Newcombe, Q.C., 473
- Judicial appointments and politics, 475, 650
- The weather and wigs, 476
- Bicycle law, 476
- Corroboratory evidence, 477
- Canadian cases in English law books, 478
- Lord Russell of Killowen, 479
- An incompetent Law Society, 577

Editorials—Continued.

- Proper dress for men in public, 578
- The law of tax sales, 579
- A law reformer, 610
- In the presence of the testator, 610
- Contracts in restraint of trade, 612
- Copyright in literary works, 650
- The law of solicitors' retainer, 651
- Justices of the peace, 689
- Legal offices and the profession, 689
- Undue influence and independent advice, 690

Ejusdem generis—

- See Lord's day.

Elections—

- Dominion—
 - Hiring teams—Executory contract—Wife's authority for husband, 248
- Provincial—
 - Proof of deposit of security—Current money of Canada, 245, 426
 - Notice of presentation of petition, 245, 426
 - Return to Clerk of Executive Council before result of recount, 426
 - Time for filing petition, 426
 - Conviction for corrupt practices—Limitation of time—Several charges, 711
- Municipal—
 - Qualification for alderman—Title by possession—Partly freehold and partly leasehold, 337

Electricity—

- See Negligence.

Engineer's certificate—

- When contractor bound by, 123
- See Ditches and watercourses.

English reports—

- Reprint of, 398

Equity of redemption—

- See Executor and administrator—Mortgage.

Equitable execution—

- See Receiver.

Estate tail—

- Bar of—Mortgage—Will, construction of, 454

Estoppel—

- Acquiescence—Flotable waters, 21
- See Company—Landlord and tenant.

Evidence—

- Commission to take, abroad—Examination, 143
- Preventing return, 213
- Setting aside—Discretion of judge reviewed, 351
- Proof of foreign law—Colonial marriage, 296
- Motion—Security for costs—Nominal plaintiff, 423, 709
- Status and boundaries of foreign state—Judicial cognizance of, 488
- Privilege of solicitor as to client, 512
- Leave to adduce after judgment in appeal, 570
- Corroborative—Interested party, 171, 572, 723
- Cross examination on affidavit—Proper questions, 590
- Salary of municipal officers—Advances—Production, 599
- See Criminal law—Executor and administrator—Libel and slander—Married woman—Rape—Will.

Examination—

See Assignment f.b.o.c.—Discovery—Evidence.

Exchequer Court—

See Customs Act—Railway company.

Execution creditor—

See Mortgage.

Executor and administrator—

Remuneration to solicitor executor, 136

Notice by disputing claim, 171

Corroboration—Joinder of parties, 171

Interested party, 572, 723

Judgment against, effect of, 215

Evidence of testator's debt, 215

Endorsement of note by, without recourse, 215

Distribution of assets—Unpaid legatee—Contribution by other legatees, 47

Limitation of action, 417

Trustee Limitation Act—Negligence—Agent's fraud, 452

Notice of claimants—Trustee Relief Act, 452

Purchase of equity of redemption—Indemnity—Death of mortgagor—Release,
453

British Columbia—Homestead Act, 246

See Devolution of Estates—Lord Campbell's Act—Married woman—Trusts
and trustee.

Exemptions—

Manitoba—Real Property Act, 170

Assignment for creditors—Selection of assignee, 244

See Assessment.

Expert evidence—

Unreliability of, 433

Expropriation—

Compensation—Injurious effect on land intended for special purpose, 409

Of leasehold interest, 676

See Crown Railway company.

Falconbridge, C.J.—

Appointment of, 396, 433

False representation—

See Fraud—Husband and wife.

Father and child—

See Parent and child.

Ferry—

Grant of—Breach of—Conflicting rights of lessee and crown, 636

Fire—

Setting out—Violation of fire by-law—Notice—Negligence—Burden of proof,
344

Fishing voyage—

Liability of owner for goods supplied, 139

Flotsam and jetsam—

71, 391, 472, 510, 608, 648, 688, 729

Foreclosure—

See Mortgage.

Foreigner—

See Conflict of laws—Divorce—Foreign debt—Foreign judgment—International law—Interpleader—Lunatic—Marriage—Power of appointment—Specific performance—Succession Duty Act.

Foreign debt—

Locality—Action, 413

Foreign plaintiff—

See Specific performance.

Foreign judgment—

Action in Ontario—Defence available in foreign court, 126

Principal and surety—Statute of Limitations, 126

See Divorce.

Forfeiture—

See Landlord and tenant—Insurance, life.

Forum, The—

A causerie of the law, 152, 228, 332, 498, 591, 696

Fraud—

Unfounded charges of—Costs, 55

False representation—Improper use of testimonials, 118

See Arrest—Audit—Attachment of debts—Contract—Vendor and purchaser.

Fraudulent conveyance—

Purchase by debtor in name of another, 69

Husband and wife—Income, 128

Proof—Laches—Fraud, 171.

See Domicile.

Fraudulent preference—

Payment to creditor with view to prefer surety, 444

Money lent for specific purpose—Repayment—Intention to prefer, 660

See Company, winding up.

Funeral expenses—

Of deceased minor—Liability, 1.

Payable by friend—Charge on estate, 23

French justice—

The Dreyfus case, 71

Free grant and homestead act—

Sale to take effect after issue of patent, 237

Free pass—

Travelling on—Loss of life and property—Conditions, 482

Gaming and wagering—

Common gaming house, 357

Gas company—

Right to stop gas supply, 59

General Sessions—

Procedure—Appeal—Costs, 312

Gift—

Made on innocent misrepresentation of facts—Mistake, 329

See Parent and child.

Goodwill—

Restraint of trade

See Partnership.

Gowan, Hon. J. R.—

Portrait and sketch of life, 513

Great Seal—

Disposal of old when new seal made, 391

Guarantee—

See Contract.

Guardian and ward—

Settlement by lady in favour of guardian—Independent advice, 226

Hagarty, Sir J. H.—

Sketch of his life, 290

Harbour—

Public—Rights of Crown to injunction, 388

Hawkers—

Bylaw for regulating, 27

Conviction under—Quashing—Costs, 27

Heating apparatus—

See Contract.

Highway—

Liability of municipality for repair of—Negligence, 34

Ice on sidewalk—Notice before action, 65

Agreement between Crown and city to maintain road—Liability, 232

Extent of liability in view of weather, 232

Gross negligence—Construction of street—Change in temperature,
419

Children playing on—Accident—Damages, 216

Dedication and acceptance of—Registered plan, 159, 677

Use of for purpose other than travel, 410

Obstruction—Reasonable user, 298

Hire receipt—

Transfer of rights under—Conditional sale, 572

Homestead act, B.C.—

See Executor and administrator.

Hospitals—

Assessment of, 307

Husband and wife—

Desertion—Husband refusing to lead chaste life, 16

Wife—Refusal of marital intercourse, 663

Undue influence—Solicitor and client—Benefit to relative of solicitor, 54, 622

Law as to, discussed, 689

Separation deed—Intercourse while living apart, 114

Misrepresentation—Setting aside deed—Pauper, 672

Fraudulent conveyance—Income, 128

Tort of wife—Liability of husband, 221

Marriage contract—Promise by wife's father to leave her share of his estate—
—Specific performance, 300

Purchase by husband in name of wife and daughter, 495

Damages for loss of wife's services, 511

Election by wife between separation deed and husband's will, 573

Deposit in savings bank in joint names—survivorship, 640

See Alimony—Divorce—International law—Marriage—Married woman.

Ice—

See Highway.

Income—

See Fraudulent conveyance.

Independent advice—

See Undue influence.

India—

Law and lawyers therein, 106

Indian—

Surrender of land—Crown title—Precious metals, 25

Conviction under Indian Act—Amendment, 453

In forma pauperis—

See Appeal.

Insolvency—

Execution completely executed, 206

Action in name of official assignee, 685

See Administration—Assignments and preferences.

Inspection—

See Contract.

Infant—

Funeral expenses of deceased minor—Liability, 1

Duty of parent to support, 2

Interest of in land—Sale to pay for improvements, 243

Custody of—Person standing in loco parentis as against stranger, 575

See Marriage settlement—Parent and child

Injunction—

Motion to dissolve - Practice, 30

Trivial injury—Costs, 89

See Lateral support—Nuisance—Restraint of trade—Statutory powers.

Insurance—**Accident—**

Swallowing hard pointed masses of food, 2

Fire—

Condition—Material change—Non-occupancy, 234

Proof of loss—Increase of risk, 337

Co-insurance condition, 421

Life—

Benevolent society—Non-payment of fees Forfeiture, 23

Benefit Society—Endorsement for wife—Revocation by will—Bylaws, 100

Beneficiary for value—Right in policy, 236

Assignment—Receivership—Security for money, 162

Action—Pleading—Condition precedent—Proof—Waiver, 122

Premium payable on presentation of policy—Non-acceptance, 236

Premium note—Non-payment—Forfeiture—Extended insurance, 247

Statutory rights of beneficiaries discussed, 249

Beneficiary certificate—Forfeiture for non-payment, 455

Assurer repudiating liability—Action for, 491

Change of beneficiary Preferred class—Beneficiary for value, 596

Marine—

Meaning of "furniture" on ship, 586

Implied warranty of seaworthiness, 661

Capture Property of alien enemy—Intention to wage war, 661

Seizure by belligerent state of property of its own subject, 661

Collision clause—Construction—Removal of wreck, 662

Of goods in transit—Clause in policy as to deviation, 15

Employers liability contract—Alteration after execution—Agent of foreign

company—Authority, 341

Guaranteeing solvency of surety—Concealment of facts, 372

Oral contract, 688

See Benevolent society.

Interpleader—

- Money in bank—Foreign claimant—Jurisdiction, 29, 68, 98
- Summary application—Insurance moneys, 98
- Parties to issue—Onus, 601
- Interference with sheriff in discharge of duty, 678

Interest—

- On money for land appropriated for public works, 335
- Legal, reduced to five per cent., 433
- Under 3 & 4 W. 4, c. 42, s. 28, 470
- From verdict, 686
- See Chattel mortgage.*

International law—

- Maritime law, 95
- Intervention in war, 95
- Outrage on Welland Canal, 293
- Status and boundaries of foreign State—Judicial cognizance of—evidence, 488
- Private—Foreign lunatic—Order of foreign Court, 588
- Domicile—French subjects, 633
- Revocation of will by marriage—Husband and wife, 633
- See Domicile.*

Irrigation—

- Land slide—Statutory powers, 57

Johnston, E. F. B., Q.C.—

- Portrait and sketch of his life, 321

Joint tenant—

- See Will.*

Judgment by default—

- Defence filed after default note—Costs, 286
- Posting statement of claim—Assessment of damages, 313

Judicial commissions—

- Objections to, considered, 363

Judicial sale—

- See Sale by Court.*

Judicial sentences—

- Apportionment of, discussed, 334

Jurisdiction—

- See Appeal—County Courts—District Courts—Ditches and water courses—Unorganised territories.*

Jury—

- Bias of juror—Relationship to party, 387
- Deaf juror, 387
- Juror not in panel, 387

Jury notice—

- Exclusive jurisdiction of Chancery, 342
- Legal and equitable issue, 342

Justice of the Peace—

- Extent of tariff of fees, 642
- Charging excessive fees, 689

Kingsmill, J. J.—

- Death of, 105, 175

Laches—

See Administration—Charging order—Fraudulent conveyance—Mortgage—Municipal law—Vendor and purchaser.

Landlord and tenant—

Execution against tenant—Bankruptcy of—Priority, 83
 Notice to quit—Yearly tenancy—"End of current year," 115
 Parol acceptance of new tenancy—Surrender—Estoppel, 284
 Covenant by new tenant to pay all taxes, etc.—Drainage works, 207
 Apportionment—Rent payable in advance, 410
 Forfeiture—Covenant not to assign
 Lease—Covenant as to use of public house—Construction, 55
 Not to let adjoining land for specified trade, 150
 Renewal—Buildings erected by tenant—Covenant, 102
 Fixing rent—Ground rent, 102
 Option, 124
 At increased rent—Construction, 708
 To trustee—Covenant by to repair—Rights and liabilities of cestui que trust, 118
 Agreement for—Covenant to pay taxes—Evidence—Discretion of judge, 126
 Lessee not named—Statute of Frauds, 414
 Right of way—Construction, 493
 Assignment without leave—Forfeiture—Election—New lease, 132
 Acceleration clause—Sale of goods on premises—Construction, 132
 Right of lessee to enforce covenant made by third person with lessor, 150
 Forfeiture—Breach of covenant—Notice of, 371
 Covenant not to assign—Equitable assignment—Trust—Notice of action, 585
 Notice of breach—Continuing breach—Covenant to build and repair, 624
 Quiet enjoyment—Erection of buildings causing chimney to smoke, 440
 Rent for renewal term, 639
 Distress—Impounding Possession, 117
 On goods removed before rent due—Pretented sale of, 239
 Illegal—Action for—Counterclaim—New trial, 239
 Bedding includes bedstead, 410
See Landlord and tenant—Tenant for life—Waste.

Larceny—

See Theft.

Lateral support—

Adjacent lands—Escape of pitch—Injunction, 60

Law School—

Address of Mr. Justice Rose, 43
 Education received at, 44

Law Society of U.C.—

Right to collect fees for annual certificates, 350

Law Associations—

County of York, 104
 Hamilton, 104

Law reforms—

Suggestions for, 517, 610, 631, 703

Lease—

See Landlord and tenant.

Legal education—

Defects of, 44

Lex loci—

See Conflict of laws.

Libel and slander—

- Evidence—Previous writings, 26
- Provocation—Mitigation of damages, 26
- Publication—Circulating library—Book circulation—Ignorance of libel, 444
- Privileged occasion—Malice—Misdirection—New trial, 571
- Inuendo—Evidence—Newspaper report of speech—Truth of words used, 603

Light—

- Obstruction—User—Interruption—Abandonment, 622

Limitation of Actions—

- Possessory title—Actual or constructive possession, 119
 - Erection of gates, 119
- Right of way over railway, 125
- Crown not bound by, 158
- Money in court not affected by, 158
- Judgment—Revivor—Fine—Notice, 165, 312
- Real Property Limitation Act, 208, 287
- Possession—Tenants in common, 210
- Annuity charged on land by will—Arrears, 215
- Acknowledgment in writing—Agent of executor—Reviving liability, 340
 - Letter to third party, 340
- Covenant in mortgage, 495
- Sale of goods—Warranty—Fraud, 637
- See Elections—Executor and administrator—Foreign judgment—Money in court—Mortgage.

Liquor License Act—

- Search for liquor—Stranger—Need of warrant—Proof, 27
- Former conviction—Proof of, by parol, 237
- Two offences in one information—Both tried together—Minute of adjudication—Hard labour—Costs, 429
- Local option by-law—Omission to nominate D.R.O., 504

Local Judge—

- See Writ of summons.

Local Master—

- See Drainage Act—Practice.

Locus solutionis—

- See Conflict of laws.

Lord Campbell's Act—

- Action by administrator—Death of sole beneficiary, 711
- See Free pass—Negligence.

Lord's day—

- Act to prevent profanation of, intra vires of Provincial Legislature, 316
- Barber not within—Ejusdem generis, 410

Lunatic—

- Foreign domicile—Committee, 151
- Contract to purchase land—Voidable—Completion by committee, 412
- Maintenance—Attachment of money deposited for, 422
- Foreign—Private international law, 588

Lynch law—

- Extirpation of, 511

Magistrate—

- See Justice of the Peace.

Malicious prosecution—

- Liability of corporation to action for, 114
- Reasonable and probable cause—Belief of defendant, 318
- Striking out embarrassing statements of defence, 646

Mandamus—

Municipal corporation, 85

Manslaughter—

See Criminal law.

Maritime law—

Share in ships—Seizure of, 36

Charter party—Customary despatch—Receipt and delivery of cargo, 241

Contract to load cargo of "about" so many tons, 407

Demurrage—Delay at loading port, 440

Full and complete cargo—Frozen cargo, 671

Trade custom affecting bill of lading, 500

Collision—Steamer and sailing vessels, 635

Market—

Validity of by-law as to, 56

See Municipal law.

Marriage—

Proof of, in Hong Kong, 296

Of Protestant and Roman Catholic—Ecclesiastical interference, 434

Foreign, of Frenchman and English woman—Validity, 628

See Husband and wife.

Marriage settlement—

By infant—Repudiation—Ratification, 52, 621

Covenant to settle wife's after acquired property, 52

Married woman—

Separate estate—Restraint on anticipation—Death of husband—Bankruptcy of wife, 91

Action by wife against husband, 676

Suing administrator for personal services to deceased—Corroboration, 171

Administratrix—Default by in payment of trust fund, 210

Attachment and order for payment against, 210

See Administration—Dower—Husband and wife—Marriage—Marriage settlement.

Master and servant—

Certiorari to remove conviction—Practice, 34

Leaving service before expiry of term—Quantum meruit, 243

Wrongful dismissal—Reference to arbitration, 284

Information under Act—Requirements, 576

Time for appearance, 576

Negligence—Damages, 123

Employer's liability—Foreman—Evidence, 214, 386, 638

Dangerous process—Want of warning, 306

Motorman—Person in charge, 311

Defect in machinery, 421, 638

Parent and child, 454

Incompetent fellow-servant, 472

Common employment, 638

Injury to workman on way to work—Course of employment, 663

Duty of master to inform servant of danger, 688

Servant obeying master's command, 688

Assurances of safety, 688

See Workmen's compensation Act Principal and agent.

Mechanic's lien—

Twenty p. c. reserve—Payment, 134

Notice in writing to owner by letter, 344

Priorities between lienholders and mortgagee—Practice, 354

Costs of appeal, 461

Trial—Procedure—Mortgagee—Materials on land, 571

Jurisdiction of Small Debts Court, Manitoba, 648

Mercantile law—

See Principal and agent.

Merger—

Equitable right to a charge—Acquisition of fee, 300
Lease—Agreement for life estate—Intention, 669

Mills, Hon. David, Q.C.—

Portrait and sketch of his life, 393

Mining law—

The Bennett-Atlin Commission—Appeal from commissioner, 37
Action to set aside certificate instead of adverse action, 37
Inspection Act—Accident by falling rock—Mine owners' duty, 38
Adjoining claims—Overlapping—Initial post, 63
Unconnected strips of land—Location, 70
Adverse action—Bill of sale—Fraud, 70
Right to possession, 127
Stating claim—Identity—Evidence, 173
Failure to record transfer—Rights, 358, 575
Unoccupied ground—Overlapping—Abandonment, 427
Notice of abandonment of interest in lease by joint lessee, 495
Manager—Payments to labourers, 595 .

Misrepresentation—

See Fraud—Husband and wife.

Mistake—

Money credited by—Receipt in full, 407
Written contract—Rectification, 438
Mutual, in construction of document, 493
Of solicitors in matter of practice, 685
See Gift.

Money had and received—

Waiver—Acceptance of part, 115

Money in Court—

Incidents respecting, 73, 158
Statute of limitations does not affect, 158

Mortgage—

Collateral advantage—Clog on redemption, 19
Rights of mortgagee after agreement for transfer, 159
Rights between mortgagor, mortgagee and assignee, 640
Conveyance of equity—Expropriation proceedings by R. W. Co., 384
Redemption, 124
Equity of—Purchase of, 453
Action to recover difference between amount due and proceeds of sheriff's sale, 315
Of lease—Assigns—Restrictive covenant—Underlease, 220
Fraud of solicitor—Liability, 236
Authority of solicitor for mortgagee to receive mortgage money, 239
Covenant—Limitation of action, 485
Foreclosure—Mortgagee in possession—Account of rents, 604
New day—Final order—Rights of purchaser after decree, 604
Sale under power—Setting aside sale under—Laches, 119
Application of surplus—Execution creditor—Lien note, 129
Costs—Taxation—Appeal from, 599
Power to give easement of light over unsold portion, 627

Municipal law—

Money bylaw—Recital of existing debt, 24
Adoption of bridge—Negligence in care of, 62
Maintenance of retaining wall—Arbitration as to, 66

Municipal Law — Continued.

- Negligence—Seven days notice of accident, 289
- Notice of action—Necessity for amendment, 609, 630
- Adjoining municipalities, 680
- Obstruction—Contributory negligence, 722
- Right of councillor to resign, 305
- Illegal contract Injunction against carrying out, 336
- Auctioneer—Regulating market, 420
- Liability of county for cost of advertising list of lands for sale for taxes, 461
- Bylaws—Revising—Quashing—Attestation of printed roll, 38
- Validity—Good rule and government of city, 118
- Work executed in contravention of—Continuing offence, 227
- Local improvements—Repairing block pavement, 28
- Board of Health—Cancelling license—Delegation of powers, 64
- Highways—Children playing on—Damages, 216
- Obstruction—Laches—Injunction, 305
- See Highway—Liability for non-repair of.
- Mandamus, 84, 305
- See Assessment—Elections, municipal—Fire—Hawkers—Police magistrate—Trading stamps—Toll roads—Transient traders—Waterworks.

Negligence—

- Collateral—Law as to, discussed, 6
- Trap door in sidewalk, 23
- In not getting out of way of running horse, 141
- Use of dangerous materials - Employer's liability, 393
- In relation to privity of contract, 178
- New trial for misdirection, 212
- Damages—Improper evidence, 212
- Sparks from steamer—Evidence, 307
- Of contractor—Liability of employer, 329
- Gross - Meaning of, 419
- Right of action for, resulting in death, survives, 472
- Mental shock, 511
- Proximate cause—Person doing illegal act at time of accident, 583
- Protection to bridge, 688
- Electric wires, 728
- Common employment, 472, 638, 728
- See Discovery - Executor and administrator—Fire—Highway—Master and servant—Parent and child—Public works—Railway company—Street railway—Trusts and trustee.

Newcombe, E. L., Q.C.—

- Portrait and sketch of life, 473

New trial—

- Misapprehension by jury, 214

Non-suit—

- Election for—Discontinuance, 227
- See Practice.

Notice—

- See Contract—Executor and administrator—Fire—Jury notice—Railway company.

Notice of action—

- Landlord and tenant, 575
- Workmen's Compensation Act, 421
- See Municipal law.

Notice of trial—

- See Practice.

Nuisance—

Obstruction of highway—Continuing nuisance, 307
Injunction—Adjoining premises—Reasonable use—Alterations, 670

O'Brien, Mr. Justice—

Eloquent tribute to, 71

Obstruction—

See Highway—Nuisance—Municipal law.

Option—

See Contract.

Options—

Law of, considered, 521

Parent and child—

Fiduciary relationship—Gift—Influence—Presumption, 161
Accident to child,—Damages, 123
Action by father—Expectation of pecuniary benefit, 316, 354
See Infant—Undue influence.

Partnership—

Right to use name of dissolved, 411
Construction of deed—Continuance after expiry of term, 448
Deceased partner—Purchase of share—Discount—Goodwill, 448
Partner pledging goods for personal advance, 501
Purchase of partner's interest by co-partner—Error—Fraud, 638
Agreement—Construction—Losses—Contribution, 723
Rectification of agreement, 469
See Particulars.

Particulars—

In tort—Material for order for, 574
In action on partnership agreement, 606

Parties—

Third party notice—Agreement—Appearance, 165, 233
See Company.

Party wall—

Adjoining owner—Implied contract to pay half of wall, 443

Partition—

Summary proceeding—Parties—Absentee—Guardian—Service, 598

Patent of invention—

Combination—Infringement, 96
Scire facias to repeal—Expiry of foreign patent, 97
Sale of—Future improvements, 121
Expiry of foreign patent, 381
Infringing articles sent abroad, 412
Evidence of utility, 491
Infringement—Injunction—Alternative relief, 627
Joint grant—Survivorship—Covenant to assign, 664

Payment—

See Appropriation of payments.

Payment into court—

Infant's fund—Trustee, 343
For leave to defend—Bankruptcy of deft. before trial—Secured creditor, 570
See Sale of goods.

Payment out of court—

Proof of age of applicant, 602.

Peddlers—*See* Hawkers.**Persona designata—**

Under Municipal Act, 461

Pleading—

Action on limit bond—Legal holidays, 242

Poetry—

The home coming, 611

Police Magistrate—

Office accommodation—Stationery, 101

Possession—*See* Landlord and tenant—Limitation of actions—Sale of goods - Vendor and purchaser.**Power of appointment—**

Execution of—Limited power—Execution by will, 50

By general bequest, 208

By will of foreigner—Domicile, 369, 371, 667

Attested by two witnesses, 667

Appointment of fund—Accretions to, 483

Joint donee—Conveyance by one—Concurrence of others—Release, 488

Limited—Appointment made prior to date of power, 667

Practice—

Objection not raised at trial, 34

Re-opening trial, 97

Adjournment of trial—Costs, 102

Interlocutory judgment—Assessment of damages, 102

Court examining previous proceedings before giving judgment, 159

Premature action, effect of, 159

Resignation of Local Master—Concurrent appointments, 304

Failure of party to agree—Dismissal of action, 308

Dismissing action for want of prosecution after notice of trial, 318

Appeal from, 352

Reference—Division of questions of law and fact, 338

Interlocutory motion dismissed—Costs, 343

Statement of claim—Service, 344

Notice of trial—Waiver of—Cause improperly entered, 352

Close of pleadings, 641

Discontinuance after plea—Leave, 353

Setting aside order for receiver, 353

Cross examination on affidavits, 358

Deceased judgment debtor—Execution against executor—Charging order, 365

Trial—Non suit after verdict, 603

Time of delivery of judgment, 607

Striking out pleadings—Fair trial, 719

New Brunswick—

Amendment of particulars at trial, 139

Judgment debtor—Examination—Privilege of a judge, 140

Wrong name in writ, 140

Costs of appeal—Corporation, 140

Affidavit—Deviation from rule of court, 141

Review—Non suit erroneously ordered—Certiorari, 317

Disclosure examination—Mandamus, 574

See Certiorari—Costs—Counterclaim—Discovery—Evidence—Judgment by default—Money had and received—Money in court—New trial—Non suit—Notice of trial—Parties—Particulars—Payment into court—Payment out of court—Pleading—Revivor—Service—Solicitor—Summary judgment.

Prescription—

See Easement—Limitation of actions—Railway company.

Principal and agent—

Sale of land—Commission to agent, 237
Contract—Undisclosed principal—Ratification—Sale of goods, 328
Meaning of agent in R.S.O. c. 150—Entrusted with possession, 338
Broker lumping several orders in one contract, 41
 Liability of principal to jobber, 441
Sale by agent—Commission—Evidence, 449
Instructions to sell realty—Implied authority, 628
Secret profit by agent—Commission, 642
See Contract—Insurance—Sale of goods—Stockbroker.

Principal and surety—

Application of payments—Mechanic's lien, 308

Probate—

See Costs—Executor and administrator—Will.

Provincial legislature—

See British North America Act—Railway company.

Proximate cause—

See Negligence.

Public house—

Tied—Mortgage of lease—Covenant, 220, 223

Public schools—

County council—Appointing arbitrators—Appeal from township council, 165
Trustee—Residence, 235
No appeal to general sessions from dismissal of complaint against city
 by-law, 238

Public works—

Liability of crown for negligence of minister of, 382
Maintenance of bridge, 382
Rifle range not, 637
See Interest.

Quantum meruit—

See Master and servant.

Quo warranto—

Procedure under discussed, 45

Railway company—

Dominion railway—Powers of Provincial Legislature, 62
Committee of Privy Council—Junction of street railway with C.P.R., 131
Switch on highway—Expropriation, 131
Right of way over—Prescription, 125
Carriage of goods—Limiting liability, 342
 Delivery to wrong person, 709
Making order of Railway committee order of Exchequer Court, 381
Expropriation—Notice of proceedings, 384
Farm crossing—Injury to stranger, 461-672
Bond of provisional directors—Consideration of bonus—Conditions, 572
Action against shareholder—Transfer of shares to director—Delay, 716
Constitutional law—Construction of highway across railway—Railway com-
 mittee, 597
 Jurisdiction of Provincial Legislature—Interpretation of statute, 673
Negligence—Condition of road bed, 63
 Want of lock at switch, 123
 Absence of safeguard—Discovery, 163

Railway Company—Continued.

Regular station—Omission or non-feasance, 174

Fencing culverts, 384

Shunting cars—Warning—Evidence, 416

See Free pass—Street railway.

Rape—

Corroboration in prosecutions for, 477

Ratification—

See Contract—Principal and agent.

Real property Act (Man.)—

Caveat—Address, etc., of caveator, 288

By company—Foreign corporation, 288

Dominion lands—Debt to crown for seed grain, 424

Redemption—

See Mortgage.

Receiver—

Debenture holders—Charge on property in foreign country—Locality of debt, 413

Equitable execution—Claim against crown—Distribution of fund—Creditors

Relief Act, 601

Order for, refused when garnishee process available, 714

See Practice.

Regicides—

List of attempts from 1848 to 1897, 512

Registry Act—

Annuity charged on land—Notice, 339

Tax deed—Certificate of title—Priorities, 415

Registered judgment—Mortgage—Priority, 726

Religious Institutions—

Division in church—Rights—Trustees, 307

Replevin—

Indemnity—Bond, 99

Reporters—

Suggestions to, 434

Repudiation—

See Contract—Vendor and purchaser.

Res judicata—

Court examining former proceedings to ascertain law and factor, 159

Extent of doctrine of, 501

Restraint of trade—

Breach of covenant not to carry on business—Goodwill, 161

Parties—Injunction, 161

Covenant in mortgage not to trade, 168

Contract not to practice medicine, 420

Contracts in, discussed, 612

Restrictive covenant—

Building estate—Number of houses, 367

Revenue—

See Custom's Act.

Revivor—

Substituted plaintiff—Absence of consent—Transfer of rights pendente lite, 712

Rifle range—

See Public works.

Right of way—

Dominant or servient tenement, 125

See Appeal—Landlord and tenant.

Riot—

Liability of county for expense of quelling, 16

Rule of court—

Ontario—February 17, 144

Russell of Killowen, Lord—

Sketch of his life, 479, 505, 517, 629

Sale by court—

Purchase for value without notice, 331

Sale of goods—

Possession—Note given for price—Passing property—Loss by fire, 64

Specific article—Warranty—Parol evidence, 234

Engine—Warranty for return of article, 235

Statute of frauds—Delivery—Acceptance, 306

Implied condition that goods answer description, 327

Passing property, 327

Authority of agent—Evidence, 354

Want of title—Damages, 419

Delivery—Place of, 422

Non-acceptance—Tender—Waiver, 460

Property not possessing—Possession—Payment into court, 460

See Contract—Principal and agent—Limitation of action.

Sale of land—

See Trusts and trustees—Vendor and purchaser.

School law—

See Public schools.

Scire facias—

See Patent of invention.

Senkler, Judge—

Death of, 106

Service—

See Writ of summons.

Set off—

See Counterclaim.

Settlement—

Contingent or vested estate, 124

By lady in favour of guardian—Independent advice, 226

See Marriage settlement.

Shares—

See Company.

Sheriff—

See Interpleader.

Ships and shipping—

See Maritime law.

Slander—

See Libel and slander.

Sleeping car company—

Liability of, 72

Solicitor—

Uncertificated—Notice of motion by, 68

Speculation suits—Costs, 147

Authority to defend for company—Dissolution pendente lite, 149

Agency terms to foreign solicitor, 172

Acting for two parties—Independent advice, 226

Employed at a salary—Right to costs, 284

Rendering signed bill of costs, 352

Enforcing undertaking of, 370

See Costs—Mortgage—Solicitor and client.

Solicitor and client—

Solicitor's retainer discussed, 651

Undue influence—Law as to discussed, 689

See Mortgage—Solicitor.

South Africa—

Complications and incidents as to war in, 152, 153

Specific performance—

Lands abroad—Foreign plaintiff, 28

Agreement for lease of share in mine, 326

See Husband and wife—Vendor and purchaser.

Statute—

Construction—Act changing form of procedure, 352

See Railway company.

Statute of frauds—

Memorandum in writing—Sufficiency of, 414

See Sale of goods.

Statutory powers—

Exercise of—Damages—Injunction, 57

Deprivation of, by agreement, 299

Stay of proceedings—

Prior action pending, 600

See Appeal.

Stockbroker—

Death of principal—Continuing account by broker, 222

Default of—Liability of principal to jobber, 585

Street railway—

Operation of electric car—Frightening horses, 67, 453

Excessive speed—Prompt action—Contributory negligence, 303

See Assessment.

Substitution of plaintiff—

See Revivor.

Succession Duty Act—

Legacy tax under—Executors' duties, 42

Money deposited in bank by foreign resident, 99

Transfer in contemplation of debt, 142

Effect of recent legislation, 156

Deduction of debts—Compromise of claim by executor, 456

Covenant to pay—"Intent to evade payment of duty," 497

Summary judgment—

Mortgage action—Immediate possession, 98

Dismissal of action, 129

Recovery of land—Staying proceedings, 166

Summary convictions—

Bringing up by habeas corpus—Review of by writ of error, 304
Amendment to—Unauthorised penalty, 679

Summary reference—

Meaning of "in a summary way," 457

Supreme Court of Canada—

See Appeals.

Supreme Court of British Columbia—

Has all powers of Exchequer Court in England, 388

Survivorship—

See Husband and wife.

Taxation—

See Costs.

Tax sales—

Law as to, discussed, 579

Taxes—

See Assessment—Company, winding up.

Telephone company—

Illegally stretching wires across streets, 496

Tenant for life—

Permissive waste, 209

Renewal of lease—Profits on business—Account, 343

Remainderman—Trust for conversion—Income, 621

See Wills, construction of.

Tenant in common—

Sale of saw logs by co-tenant—Refusal to receive, 510

See Limitation of actions—Trover.

Theatre—

Right of audience to hiss actor, 392

Theft—

Conviction of minor under 16—Form of, 644

Summary trial—Excessive penalty, 679

Evidence to support conviction, 714

See Criminal law.

Timber licenses—

Right of legislature to affect certain licenses, 310

Manufacturing condition, 310

Tolls—

See Yukon Territory.

Toll roads—

Assessment of, 350

Tool of trade—

Violin is not a, 574

Tortfeasors—

See Trover.

Trade custom—

Requisites of, to bind public, 500

Trade description—

False application of, 24

Trade name—

- Colourable imitation, 61
- Sale of business with right to use for limited period, 707

Trade union—

- Watching and besetting, 88

Trading stamps—

- Sale of, or offering to sell—Transient traders, 26
- Act against use of, not ultra vires of Provincial Legislature, 468

Transient traders—

- Conviction—Penalty—Costs, 386

Trespass—

- Damage to property—Supposition of right—Access to shore, 455
- Interference with dam, 718

Trial—

- See* Practice.

Trover—

- Joint tortfeasors—Compromise of action by one, 115
- Order for payment of money—Damages, 206
- Tenants in common—Removal of chattel to foreign country, 309

Trusts and trustees—

- Trustees severing in defence—Costs, 54
- Lease to trustee—Rights and liabilities of cestui que trust, 118
- Remuneration to trustee, 246, 725
- Sales of lands by—Approval of court, 595
- Profits made by persons in a fiduciary capacity, 484
- Breach of trust—Negligence—Immunity clause of Trustee Act, 494
- Retainer of trust property till arrears due by settlor paid—Assignee of settlor, 625
- Resulting trust—Subscription to maintain poor person—Death of—Surplus, 666
- Trustee purchasing from himself—Title, 700
- See* Administration—Executor and administrator—Will, construction of.

Trustee Act—

- Solicitor executor's costs, 136

Tupper, Sir C. H.—

- Portrait and sketch of his life, 41

Undue influence—

- Law as to, discussed, 689
- See* Husband and wife—Guardian and ward—Parent and child.

Unorganized territory—

- District courts—Vendor and purchasers Act—Jurisdiction, 134
- New trial—Limitation to fourteen days, 385

Vacation—

- Where to spend, 430

Venue—

- Statement of, in writ—Right to change in claim, 344
- Residence of plaintiff when statement delivered, 601
- Change of—Grounds for—Criminal libel—Political bias, 428
- When may be made, 606

Vendor and purchaser—

- Title—Practice—Vendor and purchasers Act, 20
- Condition against alienation—Reverter—Unwilling purchaser, 50
- Payment by instalments—Repudiation by purchaser after part payment—
- Right of vendor to retain money paid—Laches, 89, 665

Vendor and purchaser—Continued.

- Purchase by trustee of settled estate—Possession—Interest on purchase money—Specific performance—Lien, 91
- Deed signed without knowledge of contents—Delivery—Fraud—Rights of mortgagee, 146
- Land subject to restrictive covenant—Continuous breach of—Waiver, 152
- Sale under registered plan—Setting apart street, 159
- Rescinding agreement for sale, 170, 505
- Specific performance—Property used as disorderly house, 297
- Agreement by vendor to pay secret commission to agent of purchaser, 205
- Conditions of sale—Outgoings, 255
- Caveat venditor discussed, 399
- Recovery of deposit by purchaser—Condition—Time of performance—Consent of third party, 408
- Covenant for title—Written contract—Mistake—Rectification, 438
- Compensation for restrictive covenants—Specific performance, 489
- Leasehold—Covenant against assignment—Lessor's consent—Unreasonable refusal, 626
- Trustee purchasing from himself—Consent of beneficiary, 700
- See Devolution of estates—Easement—Fraudulent conveyance—Lunatic

Verandah—

- Integral part of building, 708

Vested interest—

- See Settlement—Will, construction of.

Wagering contract—

- Illegality not set up—Duty of Court, 584

Waiver—

- See Arrest—Money had and received—Vendor and purchaser.

Warranty—

- See Limitation of actions—Sale of goods.

Water works—

- Improper construction—Notice—Waiver, 122
- Arbitration—Payment into Court—Interest, 124

Waste—

- Landlord and tenant—Alteration of nature of premises, 439

Weights and measures—

- Adding weight of paper to article sold, 86

Watercourse—

- Flood—Change in course of stream, 126

Wild animals—

- Statutory protection of, 696

Will—

- Legatee preparing, in his own favour, 58
- Of foreigner—Execution of power of appointment by will—Domicile, 369
- Execution of, in presence of testator, 610
- Insane delusion—Lucid interval
- Probate of, lost—Proof—Consent, 16
- Evidence of corroboration, 723
- Will annexed—See Administration.
- Setting aside—Costs—Dismissal without costs—Costs out of estate, 340
- Revocation by marriage, 633
- See International law.

Will, construction of—

- Devise over, previous to death of another, 24
- Legacy—Vesting—Postponed period of distribution, 56
- Remoteness—Intestacy—Maintenance, 93
- Survivorship—Accruer, 418
- Contingent or vested interest, 56, 125
- Gift for particular purpose—Surplus—Resulting trust, 151

Will, construction of—Continued.

- Name and arm's clause—Use of surname, 152
- Absolute gift—Joint tenants—Secret trust—Notice, 225
- Hotchpot clause—Limitation Act—Rent due testatrix from property of which child acquires possessory title, 299
- Inconsistent clauses—Executory devise—Failure of issue, 305
- Annuity—Charge on land—Registration, 339
 - Interest on fund, 454
- "Issue"—"Children," 367
- "Die without child"—Executor's gift over, 485
- "Die unmarried," 668
- Intention—Estate tail, 372, 454
- Direction to accumulate—Tenant for life—Conversion, 373
- Eldest son entitled to possession—Sale by, 487
- Mortgagee in possession—Demise of mortgaged property, 487
- Devise of residue—Executory devise—Event happening in part, 594
- Devise to legatee, his heirs, executors, etc.—Death of legatee in lifetime of testator—Who entitled, 595
- "Testamentary expenses," what included in, 625
- Specific devise—Residuary gift—"All other, my freehold," etc.—Lapsed devise, 625
- See Power of appointment.

Wilson, Matthew—

- Portrait and sketch of life, 145

Wires—

- See Telephone company.

Words, meaning of—

- | | |
|---------------------------|----------------------------|
| Absence beyond seas, 126 | Gross negligence, 419 |
| At, 422 | House, 367 |
| Bedding, 410 | Issue, 367 |
| Besetting, 88 | Liquor, 30 |
| Blackmailing, 603 | Ordinary resident, 98 |
| Carriage, 443, 476 | Ordinary way, 168 |
| Children, 367 | Owner, 418, 421 |
| Course of employment, 663 | Porch or projection, 708 |
| Die unmarried, 668 | Public hospital, 307 |
| End of current year, 115 | Public works, 637 |
| Entrusted, 338 | Purchased, 29 |
| Exists, 382 | Summary way, 457 |
| Farmers' sons, 707 | Testamentary expenses, 625 |
| Farm purposes, 461 | Tool of trade, 573 |
| First refusal, 668 | Verandah, 708 |
| Furniture, 586 | Watching and besetting, 88 |

Workmen's Compensation Act—

- Notice of action, 421
- Death of child—Father dependent on child, 671
- See Master and servant Negligence.

Writ of error—

- See Summary conviction.

Writ of possession—

- Interference with sheriff, 678

Writ of summons—

- Service out of jurisdiction, 36, 98, 173, 240, 287, 426
 - On agent—When substitutional service allowable, 240
 - Substitutional—Foreign corporation—Waiver, 287
- Affidavit for order for, 427
- Jurisdiction of local judge to make order, 427

Yukon Territory—

- Now an Admiralty district, 1
- Franchise over Dominion lands—Tolls, 415

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